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VOLUME I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 326

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST HARRIET BOUSLOG SAWYER, PETITIONER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 29, 1958
CERTIORARI GRANTED NOVEMBER 17, 1958

NO. 15109

United States
Court of Appeals
for the Ninth Circuit

HARRIET BOUSLOG SAWYER,

Appellant,

vs.

BAR ASSOCIATION OF HAWAII,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 288)

Appeal from the Supreme Court for the Territory of Hawaii.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-6-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Supreme Court of the Territory of Hawaii
No. 3044

In the Matter of:

HARRIET BOUSLOG SAWYER, Also Known as HARRIET BOUSLOG, an Attorney-at-Law.

COMPLAINT UNDER RULE 19

To the Honorable, the Justices of the Supreme Court of the Territory of Hawaii:

Comes now the Bar Association of Hawaii, an unincorporated association, and on information and belief complains to this Honorable Court under Rule 19 of the Rules hereof as follows:

I.

That Harriet Bouslog Sawyer, hereinafter referred to as the Licensee, is and at all times hereinafter mentioned continuously has been an attorney-at-law duly licensed and admitted to practice before all of the courts of the Territory of Hawaii and before the United States District Court for the District of Hawaii, and that the said Licensee is now and during all of said times herein mentioned has been a practitioner before said courts.

II.

That the said Licensee, while appearing as counsel of record for certain defendants in that certain case in the United States District Court for the District of Hawaii entitled "United States of

America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et al., Defendants," being Criminal Number 10495 in said Court, during the course of the trial of said case, to wit, on or about December 14, 1952, did say during a speech to a public gathering in Honokaa, Hawaii, that horrible and shocking things were going on at said trial; that a fair trial was impossible; that all of the rules of evidence were being scrapped so the government could make its case; that the rules of evidence and procedure were made up as the case proceeded; and that unless the trial was stopped in its tracks certain new crimes would be created.

III.

That said Licensee did during the course of said trial and shortly after rendition of a verdict therein visit a juror who was known by her to be indisposed, and thereafter submitted her affidavit concerning an interview with said juror to the presiding judge under circumstances indicating a failure to comply with standards of professional conduct required of practitioners of law licensed to practice before this Court.

Wherefore, the Bar Association of Hawaii prays this Court to refer this complaint to the Committee on Legal Ethics and Unauthorized Practice of this Court for investigation in conformity with Rule 19 of the Rules of this Court.

Dated: Honolulu, Hawaii, July 8, 1954.

Respectfully submitted,

BAR ASSOCIATION OF HAWAII,

By /s/ MASAJI MARUMOTO,
Its President.

[Endorsed]: Filed July 8, 1954.

[Title of Supreme Court and Cause.]

BILL OF PARTICULARS

Pursuant to an Order entered on September 21, 1954, by the Legal Ethics Committee, the following Bill of Particulars is hereby furnished:

1. Copy of the affidavit of Harriet Bouslog, subscribed and sworn to before a notary public on the first day of July, 1953, signed by the Licensee Harriet Bouslog and filed in the United States District Court for the District of Hawaii on July 1, 1953, in the case of United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et al., Defendants, Criminal No. 10,495.

"Affidavit of Harriet Bouslog

Territory of Hawaii,
City and County of Honolulu—ss.

I, Harriet Bouslog, being first duly sworn, on oath depose and say:

On Friday evening, June 26, 1953, shortly before 6:00 o'clock I received a telephone call at my home from Ellen Fuller Cabreros, sister of David P. Fuller who sat as a juror in the case of United States v. Fujimoto, et al. Mrs. Cabreros asked me if I could come and see her brother; that he was seriously ill.

I went to the Fuller home at 1734 Colburn Street and was taken by Mrs. Cabreros and Mrs. Fuller into the front bedroom where Mr. Fuller was lying in bed. He appeared to be gravely ill. [20*]

I talked with his wife, Helen Fuller, in the living room of their home in the presence of Ellen Fuller Cabreros and her friend, Grace Oshiro, and two of the Fuller children. All members of the family present were upset and in tears at the state of Mr. Fuller. Mrs. Fuller stated that she had called a doctor to examine her husband and informed me that her husband had been ill since the return of the verdict, and particularly since early in the morning of Saturday, June 20, 1953, the morning after the verdict was returned.

Mrs. Fuller said that on Saturday morning, the day immediately following the verdict of guilty in the Smith Act case, at about five o'clock in the morning, she found her husband on his knees praying, begging God for mercy, saying he had sinned, that he had lied in the eyes of God; that Jack Hall

*Page numbering appearing at foot of page of original Certified Transcript of Record.

was innocent and the case was a frame-up; that Jack Hall is a good man; that those people are doing good for humanity and here someone is trying to block them. She said that in the time since, her husband had told her that the jury only looked at the Government's case and scarcely talked at all about the defendant's side and their case; that he asked her and the children to forgive him because he had done something wrong and it was too late; he said that one of the jurors said the defendants were innocent, and when the other jurors said, 'Guilty, guilty,' that juror threw a book across the room and said they just as well forget about it. Mrs. Fuller said that her husband had wanted to go see the Judge and confess that he had lied, and once or twice tried to leave the house but was too upset mentally and physically and unable to leave the house by himself; that he fell and struck his head. She said that she and other members of her family urged him not to do anything, not to go to see the Judge and to forget about it, that he would only get himself in trouble and would get them in trouble, and that he might go to jail.

Mrs. Fuller said that when he tried to leave and was unable to, she and other members of the family put him back in bed and tried to keep him quiet; that he kept shouting and crying and praying saying that the case was a frame-up, that he had done wrong, and told the children and her to stay away from him because he was not clean. She said that his condition seemed to get worse and worse as the

days went by until on Friday, June 26, 1953, all day he was in bed and did not move or get up at all, and his voice became scarcely a whisper because he was hoarse from the shouting on previous days.

After the conversation with Mrs. Fuller, I went in the bedroom where Mr. Fuller was and asked him if he wished a drink of water. He nodded that he did. During this time, Mrs. Fuller, his sister and her friend were present in the room. Mr. Fuller struggled to talk and make himself heard but because of his weakened physical condition and the loss of his voice, it was difficult to understand what he said. He stated understandably, [21] however, that he wanted help and wanted to get a clear conscience and get the wrong he had done straightened out.

Shortly after my arrival, a Doctor Chang arrived. I was not present in the bedroom during the conversation between Dr. Chang and Mrs. Fuller, although I could hear the conversation between Dr. Chang and Mrs. Fuller from the living room. After Dr. Chang had talked to Mrs. Fuller, Mrs. Fuller told me that the doctor said after examining her husband that there was nothing physically wrong with him, that he would have to rest in bed, and that it might be necessary to take him to a hospital unless he would get up to go to the bathroom.

After the doctor had left, in the presence of Mrs. Fuller, Mrs. Cabreros and her friend, Grace Oshiro, and Mrs. Fuller's eldest daughter, I gave Mr. Fuller water and he was propped up in bed. Again

he tried to talk but seemed to find difficulty in doing so. He said he wanted to talk about the matter and would talk to Jack Hall or anyone at any time to get a clear conscience.

Shortly after this I left, believing Mr. Fuller needed rest. I made arrangements with Mrs. Fuller and Mr. Fuller to come to see him the next day with Jack Hall.

On Saturday morning I was informed by Mrs. Cabreros that her brother was feeling considerably better and wanted to and would be able to see us.

When Mr. Hall and I arrived at the Fuller home about 1:00 o'clock Saturday afternoon, June 27, Mr. Hall put out his hand to Mr. Fuller, Mr. Fuller looked at Mr. Hall for a long time and finally took his hand. Mr. Hall told Mr. Fuller he did not hold anything against him; that he just wanted Mr. Fuller to get well.

Mr. Fuller said to Mr. Hall that from the talk of guilty by other jurors in the jury room, he believed he had to vote guilty to protect his brothers because he was afraid they would be fired if he did not. Mrs. Fuller said that both of Mr. Fuller's brothers, Leonore and Harry, worked for Isle-Ways. Mr. Fuller said that it wasn't right that they only looked at Government exhibits and not at the defendants' exhibits or case. He said it was a frame-up and said he blamed himself. He said that they looked at Government exhibits and any time someone suggested looked at defense exhibits some

juror would say, "Later, later," and they never got around to it. He said that he knew and believed the defendants were innocent all the time but was afraid of what would happen if he voted not guilty.

He said that the jury in their deliberations decided that the Communist Party was a conspiracy within the first hour after they began their deliberations. He [22] said that the instruction of the Judge which they used to decide this was the one which told them first to decide whether there was a conspiracy, and they decided the Communist Party was a conspiracy. He said he knew from what he heard the defendants were convicted before the case started on ideas the jurors had before the case started. He said he heard two jurors tell the Judge that they were opposed to Communism during the examination. He said that no secret ballots were taken, so everyone knew how each juror voted. He said some of the jurors said the Government wouldn't bring the charge if it wasn't true. He said that at some time he heard it said that if the defendants weren't convicted it would affect Hawaii's getting statehood. He said that the jurors on the side of the Government said that anybody who was a member of the Communist Party must know what its purposes are and are guilty.

He said that the jury wanted Kawano's testimony. He said that jurors on the defense side asked for Kawano's testimony to show that none of the defendants ever talked about overthrowing or destroying the government.

He said that one juror said a number of times

during the deliberations that he had to go to the Mainland and that they should get it over with.

He said that if he voted for the defendants he was afraid the other jurors would tell about it and it would hurt his family. He said one of the jurors played cards in the jury room. He said that there was anger and shouting in the jury room between the persons who were for the prosecution and those who were for the defense. Particularly the jurors for the prosecution got angry with the ones who were holding out.

He said they didn't take any secret ballot, but anybody on the defendants' side had to speak up and then the others would try to get them to back down. He said that he heard jurors talk about Attorney Gladstein and said he was too smart and that he had defended the Communists in New York an had served a jail sentence. He said that he heard some of the jurors talk about the war against Communism. He said that they didn't consider the character evidence for the defendants.

He said the second thing the jury decided was that all defendants were members of the Communist Party. The next thing they decided was that if they were Communists they must have intended to overthrow the government. He said that he himself did not believe Kawano and he heard others say they did not believe Muller. He said that after they asked for the instructions they used the one which told them to decide first whether there was a conspiracy, and right off they decided there was,

and then talked about whether defendants were members of the Communist Party. He said there was a lot of talk about Bailey. [23]

After this conversation took place, when Jack Hall and I started to leave, Mr. Fuller begged Mr. Hall not to leave and raised his hands above his head and appeared to be praying although the words were not audible. Before leaving, Mr. Hall tried to quiet Mr. Fuller and helped Mrs. Fuller put her husband in bed.

Mr. Hall and I again went to see Mr. Fuller on Sunday, June 28, shortly after 1:00 o'clock in the afternoon. We were accompanied on this occasion by Joseph Kealalio. When we arrived, Mr. Fuller was sitting in a chair in the living room. He kept looking at Mr. Hall but did not speak.

After conversing with Mrs. Fuller for a very short period of time, we came to the conclusion that it would be better to wait until Mr. Fuller was in better physical and mental condition.

When Mr. Hall started to leave, Mr. Fuller again pleaded with him not to leave.

Further affiant saith not.

/s/ HARRIET BOUSLOG.

Subscribed and sworn to before me this 1st day of July, 1953.

[Seal] /s/ J. D. MARQUES,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires July 15/53."

The Complainant Bar Association neither affirms nor denies the truth or falsity of the allegations and facts contained in the affidavit filed by the Licensee Harriet Bouslog. The Complainant informs the Committee that the above-recited affidavit, its contents, and the manner in which it was obtained furnishes the basis for the charge against the Licensee Harriet Bouslog and that the Complainant will introduce evidence in elaboration of and in corroboration [24] of the charge indicating a failure by the Licensee Harriet Bouslog to comply with standards of professional conduct required of practitioners before this Court and which unprofessional and unethical conduct is condemned in Opinion 109 issued March 10, 1934, by the Committee on Professional Ethics and Grievances by the American Bar Association and by Judge Prettyman in the case of Rakes v. United States, 169 F. 2d at pages 745 and 746 and other related cases.

Dated: Honolulu, T. H., this 29th day of September, 1954.

Respectfully submitted,

BAR ASSOCIATION OF HAWAII,

By /s/ A. WILLIAM BARLOW,
Attorney. [25]

[Title of Supreme Court and Cause.]

REPORT OF LEGAL ETHICS COMMITTEE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the Territory of Hawaii:

The Legal Ethics Committee, pursuant to a letter from the Honorable Edward A. Towse, dated July 8, 1954, has investigated a complaint filed by the Bar Association of Hawaii and makes this report of the charges, facts and conclusions of the Committee pursuant to Rule 19.

The Charges:

The two charges made in this complaint have to do with (1) the alleged improper conduct of Mrs. Harriet Bouslog Sawyer, referred to in this report as "Mrs. Bouslog," in making a speech at Honokaa, Hawaii, on December 14, 1952, and (2) the alleged improper conduct in connection with her interview of the juror David P. Fuller, as more fully set forth in the Bill of Particulars dated September 29, 1954.

The Facts:

The Committee finds that Mrs. Bouslog was one of the attorneys appearing for certain defendants in the [77] United States District Court for the District of Hawaii entitled "United States of America, Plaintiff, against Charles Kazuyuki Fujimoto, et als., Defendants," being Criminal 10495 in

that Court; that on December 14, 1952, during the course of the trial, she made a speech at a public gathering at Honokaa, at which she said, among other things, that horrible and shocking things were going on at the trial; that there was no fair trial in the case; that they just made up the rules as they went along; that unless the Smith Act trial was stopped in its tracks in Honolulu there would be a new crime.

With respect to the charges in paragraph III, the Committee finds that after rendition of the verdict in Criminal 10495, mentioned above, Mrs. Bouslog visited one of the jurors, David P. Fuller, Jr., while he was in a very poor mental and physical condition and thereafter submitted her affidavit concerning an interview with the juror to the Presiding Judge.

Wihle the affidavit of Mrs. Bouslog indicates that on the first occasion he was gravely ill, the Committee finds that she did not fully disclose to the Court the condition of Mr. Fuller, nor the fact that she had attempted to get affidavits from Mrs. Fuller, who refused to sign one, and could not get an affidavit from Mr. Fuller because of his condition.

Conclusions and Recommendations:

The Committee is of the unanimous opinion that the Bar Association of Hawaii has sustained the allegations in paragraphs II and III of its complaint and that Mrs. Bouslog, in imputing to the Judge unfairness in the conduct [78] of the trial, in

impugning the integrity of the local Federal courts and in other comments made at Honokaa, was guilty of violation of Canons 1 and 22 of the Canons of Professional Ethics of the American Bar Association and should be disciplined for the same.

The Committee is likewise of the unanimous opinion that it was improper for her to submit her affidavit concerning the interview with the juror Fuller to the Presiding Judge under the circumstances under which it was submitted. There are differences of opinion within the Committee as to whether her interviews with juror Fuller were proper, as to whether they were in violation of Canon 23 of the Canons of Ethics and as to whether she should be disciplined, although the majority think she should be disciplined with respect to the charges in paragraph III.

Dated: Honolulu, Hawaii, June 9, 1955.

Respectfully submitted,

/s/ C. DUDLEY PRATT,
Chairman;

/s/ MILTON RODES,

/s/ CLIFTON H. TRACY,

/s/ E. C. PETERS,

/s/ [Indistinguishable],

Of the Legal Ethics
Committee. [79]

I concur in the findings of the Committee that the conduct of the respondent was, with respect to the Honokaa speech and with respect to the matters concerning the juror, improper.

I do not concur in the conclusion that the other members of the Committee have reached with respect to the recommendations we should make to the Court.

This is a proceeding under Rule 19 of the Rules of the Supreme Court. This Committee's authority to act and its duties are set forth in that Rule.

> On completion of the hearing the Committee shall file with the Court its findings of fact, conclusions of law and recommendations as to action to be taken by the Court in the matter * * * (Emphasis added).

I do not believe the underscored words mean only that this Committee should merely recommend that disciplinary action should or should not be taken. I believe that the Rule means that this Committee has a duty to go further and recommend the nature of the discipline it feels is proper.

I would recommend that, for the improper conduct of Mrs. Bouslog with reference to the Honokaa speech, she be suspended from the practice of law for such period of time as the Court may deem just and proper. I believe this to be by far the more serious of the two charges.

I would recommend that, for the conduct regard-

ing the juror which this Committee has found to be improper, she be reprimanded.

Dated: Honolulu, T. H., June 9th, 1955.

/s/ R. G. DODGE.

[Endorsed]: Filed July 1, 1955. [80]

[Title of Supreme Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Pursuant to the order of this Court, respondent makes this return to the Order to Show Cause issued herein July 1, 1955:

1. Neither the Order to Show Cause, nor the Report of the Legal Ethics Committee, on their face, or as applied to the facts, show cause for disciplinary action against respondent for the reasons set forth in her motion to dismiss and motion for reconsideration which are hereby incorporated and made part of this return.

2. The findings of fact of the Legal Ethics Committee as to respondent's speech at Honokaa, Hawaii, on December 14, 1952, and the conclusions and recommendations of the Committee with respect thereto should not be adopted for the reasons that:

a. The four phrases assertedly taken by the Committee from the context of respondent's speech do

not fairly or accurately reflect what respondent said on that occasion as is shown by the statement made by respondent about her Honokaa speech to Federal Judge Jon Wiig in United States v. Fujimoto, et al., Cr. No. 10,495, on December 16, 1952, which respondent incorporates herein, attaches hereto as Exhibit A, and adopts as her answer to the charges based on her Honokaa speech. [250]

b. These same remarks were investigated at the direction of Federal Judge Jon Wiig, as appears from said Exhibit A, and were found not to furnish the basis for any proceedings in the Federal Court.

c. Respondent denies that she imputed to the Judge unfairness in the conduct of the trial or impugned the integrity of the local Federal Court or was guilty of violating Canons 1 and 22 of the Canons of Professional Ethics of the American Bar Association.

d. The portion of the transcript of the record in United States v. Fujimoto, et al., attached as Exhibit A, shows that respondent's conduct in respect to her Honokaa speech is a matter within the exclusive jurisdiction of the Federal Court.

e. The portion of the transcript of the record in United States v. Fujimoto, et al., attached as Exhibit A, shows that respondent's right to make her Honokaa speech is guaranteed by the First Amendment, and cannot be made the subject of punishment by a legislative court of the United States.

3. The findings of fact of the Legal Ethics Committee as to respondent's affidavit concerning Juror Fuller, and the conclusions and recommendations of the Committee with respect thereto, should not be adopted for the reasons that:

a. The assertion that respondent did not fully disclose to the Court the condition of Juror Fuller is shown to be untrue by respondent's affidavit attached to the supplemental motion for new trial filed in the Fujimoto case, the affidavit of Ellen Fuller Cabreros and Jack Wayne Hall, which said motion and uncontroverted affidavits are incorporated herein and attached hereto as Exhibit B, and adopted as respondent's answer to the charges based on the Fuller affidavit. [251]

b. The complaint pursuant to which the Committee's hearing was had did not charge respondent with not disclosing to the Court that she had attempted to get affidavits from Mrs. Fuller who refused to sign them, nor is said finding material, nor a basis for discipline.

c. The trial judge in United States v. Fujimoto, et al., denied a hearing and the opportunity to produce testimony in support of the defense motion for a new trial based on respondent's affidavit; hence any findings of non-disclosure of any fact concerning Juror Fuller are speculative assumptions.

d. The finding that respondent did not fully disclose to the Court that she "could not get an af-

fidavit from Mr. Fuller because of his condition" is erroneous for reasons apparent from her affidavit and the affidavits of Ellen Fuller Cabreros and Jack Wayne Hall. (See Exhibit B.)

e. Respondent denies the correctness of the conclusion of the Committee that it was improper for her to submit her affidavit concerning Juror Fuller to the presiding judge under the circumstances in which it was submitted, and asserts that her duty to her clients made mandatory her calling the matters set forth in the affidavit to the attention of the trial judge in support of the defense motion for a new trial.

f. The question of the propriety of respondent's filing an affidavit in the United States District Court in support of a motion for a new trial is a matter within the exclusive jurisdiction of the federal system of courts in the Territory of Hawaii.

g. Consideration by this Court of the question of the propriety of the filing of an affidavit in support of a motion for new trial in the Federal Court in the Fujimoto case, while [252] the question of the propriety of the judge's action in denying said motion without hearing is pending on appeal in the United States Court of Appeals for the Ninth Circuit, is an interference with the appellate jurisdiction of that Court.

Wherefore, respondent prays:

1. That a time in advance of the hearing herein

be fixed for a prehearing conference to define the issues on which testimony is to be adduced.

2. That the Order to Show Cause be dismissed.

Dated: Honolulu, T. H., this 2nd day of December, 1955.

HARRIET BOUSLOG,
Respondent,

By /s/ MYER C. SYMONDS,
Her Attorney.

[Endorsed]: Filed December 2, 1955. [253]

EXHIBIT A

In the United States District Court for the District of Hawaii

Criminal No. 10,495

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES KAZUYUKI FUJIMOTO, and Others,
Defendants.

Pursuant to agreement between counsel for all parties, the portion of Volume 23, dated December 16, 1952, from page 2896 to and including page

Exhibit A—(Continued)

2906, of the above-entitled case held before the Hon. Jon Wiig, Judge, is hereby corrected to read as follows: [254]

Afternoon Session—December 16, 1952

(The Court convened at 1:15 p.m.)

(Jury absent.)

The Court: Mrs. Bouslog, when were you admitted to practice in this Court?

Mrs. Bouslog: In the year 1941, your Honor.

The Court: Do you remember the date?

Mrs. Bouslog: The certificate, your Honor, hangs in my office, but I believe it was some time in December in 1941. I was notified that I had passed the bar examination in the Territory, as I recall, after Pearl Harbor. So I believe it was the latter part of December in the year 1941.

The Court: I have before me a newspaper clipping from the Honolulu Star Bulletin of yesterday afternoon in which it purports to quote statements made by you on December 14, 1952, at Honokaa, Hawaii, at a meeting. Do you have anything to say as to the newspaper report?

Mrs. Bouslog: I do indeed, your Honor. I want to say that I welcome the opportunity to state to the Court the substance of what was said at that meeting, and I assure your Honor that the excerpts wrested from the context will not reflect the substance of the context of that speech. Of the words,

Exhibit A—(Continued)

of the words attributed to me in quotes, I recall clearly that I did say, "There is no such thing as a fair trial in a Smith Act case." I explained, your Honor, the reason for that [255] statement. The reason, I said, was that ideas and books are on trial in a Smith Act case, and that years of propaganda which preceded the enforcement of the Smith Act both by the Government and by the Commercial press has created such an atmosphere of hysteria that the very word "Communism" has become such a deadly label that it is almost impossible for jurors to put out of their minds all they have read and heard outside the courtroom. In substance, your Honor, I said in respect to this statement no more than defense counsel said in the motion on file before this Court for a transfer of the place of trial. In substance, I said no more than what Justices Black and Dougles, dissenting, said concerning the Smith Act in the Dennis case.

The balance of the words other than the ones I have just quoted—which I recall clearly having said—the balance of the words attributed to me in quotes, either I did not say or they are so torn from context as to wholly distort my speech as a whole. Apparently Mr. Walsh is not satisfied to try my clients on sentences or parts of paragraphs ripped from context but he desires to try me on sentences, on portions of sentences and words extracted from the context in which they were said. This, I am sure, that this Court will not permit.

My speech was extemporaneous, an extemporane-

Exhibit A—(Continued)

ous speech, your Honor. I have no notes as to the exact words or the full content. Upon learning, however, this morning [256] from my colleagues that your Honor was going to give me an opportunity to state the substance of the remarks which I did make, I dictated to my secretary the substance of the speech.

I began my remarks by explaining what the Smith Act is and how the prosecution goes about trying a Smith Act case, reading excerpts from books that were written many years before the defendants in this case were born. I spoke of the difference between a Smith Act case and the ordinary criminal case in which a person is tried for what he has done, not for what he thinks—what is in his mind. I explained what a conspiracy is and showed how it can be used to charge a group of persons with agreeing to do what the prosecution cannot prove any single individual did.

In this respect, your Honor, my explanation was drawn from the criticism of the Senior Circuit Judges of conspiracy charges which we cited to your Honor in the brief which we filed and indeed quoted the language of the Supreme Court itself on conspiracy and calling it a dragnet.

My remarks at the meeting at Honokaa concerning the rules of evidence were directed towards the conduct of the prosecuting attorneys in Smith Act cases; how they use a conspiracy charge for the

Exhibit A—(Continued)

very reason that it permits them to introduce evidence that would not be admissible under the ordinary criminal charge.

I said that in Smith Act conspiracy cases the [257] prosecution had gone beyond the scope of the rules of evidence, even in other conspiracy cases. My remarks were no more in substance than has been stated to this Court in the memorandum filed by defense counsel, submitted in support of the motion to strike the entire testimony of the witness Crouch. In fact, your Honor, my objective in the speech at Honokaa was to state in ordinary language that laymen would understand the content of the decisions of the courts cited in that brief.

The second half of my speech—after speaking generally concerning the tactics of the prosecution in the Smith Act cases and the Smith Act—was devoted to a discussion of the evidence on which the prosecution in this case is seeking to convict Jack Hall and the other six defendants in this case. I used several illustrations. One, I used the testimony of Paul Crouch about riding horses on the Russian plains and talking to a Russian general in 1927. I pointed out the defendants couldn't have possibly cross-examined the Russian general, first, because he had been dead for many years and, second, even if he weren't it would probably be impossible since he is a Russian. I pointed out at the time that Paul Crouch was in Russia, Eileen Fujimoto was five years old and Jack Hall, aged thirteen, was just

Exhibit A—(Continued)

ready to start high school in Southern California. Yet I said Crouch's testimony of his plotting to infiltrate the Armed Forces and to [258] commit acts of espionage and sabotage while in Russia in the year 1927 was being used against the defendants in this case.

Another illustration that I used from this trial was the testimony of Henry Johnson who testified that some time in 1945 or 1946 he showed Jack Hall a duffel bag and told him it contained Marxist literature. That, although Johnson admitted on cross-examination that he didn't tell Jack Hall what books the duffel bag contained, in effect the fact that Jack Hall had seen the duffel bag was used as a basis for introducing numerous books in evidence which Johnson testified the duffel bag contained.

Another illustration I used was that of the testimony of Ichiro Izuka who testified under oath in the Reinecke case that he didn't learn until after he left the Communist Party that it advocated the use of force and violence, and that therefore his testimony was of no value to the prosecution to prove the crime charged against these defendants but that nevertheless the prosecution called him and used him in this case to testify to matters completely at variance with his sworn testimony in prior cases.

To illustrate the difference between the application of the rules of evidence in ordinary cases and

Exhibit A—(Continued)

in Smith Act cases, I told how the Supreme Court of the Territory of Hawaii had refused in the Palakiko and Majors case which involved a [259] question of life and death to permit the testimony of Mrs. Frances Hughes of an admission by Detective Vernal Stevens that he had struck Palakiko before he obtained his statement on the technical ground that no foundation was laid because Vernal Stevens was out of the Territory.

Yet in Smith Act cases I pointed out the prosecution puts on witnesses to testify to things that were said and done by third persons not only on the mainland of the United States but in other countries halfway around the world, and even though the defendants here do not know, have never had any contact with the third persons mentioned and never heard of them before this trial.

I closed my case or my speech by saying that a new crime is being created, the crime of reading. I quoted exactly from, to the best of my recollection, from the closing argument to the jury by the prosecution in the Los Angeles case, in which the prosecution said the defendants asked people to read, read, read, and that they never at any time told people not to read anything. I said that if Smith Act prosecutions continue, the only safe thing will be not to know how to read. And that Smith Act prosecutions, unless stopped, will lead to thought control. I said further that the Smith Act can be stopped

Exhibit A—(Continued)

here in Hawaii if enough people began to understand the danger of such prosecution.

As the Court can see, my remarks were directed towards [260] the conduct of the prosecution and were not directed towards the Court. By that I do not mean to say that the defense counsel in any way recede from the position that was taken in the brief filed in connection with the Crouch testimony, in which we believe we have cited authorities showing that your Honor has admitted evidence which is not admissible even in the ordinary conspiracy case.

I feel, your Honor, that when the words—and you will note in some cases they are single words—are put back into the context of the whole speech that it must be clear to your Honor that there was no contempt of this Court involved in the speech and that the criticism was directed to the conduct of the prosecution in Smith Act cases.

The Court: Before you sit down, I would like to ask you, did you say at that meeting that things go on at the trial, referring to this trial, that are unbelievable and——

Mrs. Bouslog: No, your Honor, that was not even attributed to me, I believe. That, I believe, was not attributed to me even in the newspaper account.

The Court: Did you say that some rather shocking and horrible things were going on in this trial?

Mrs. Bouslog: I have no recollection of that

Exhibit A—(Continued)

statement. I did undertake to explain in factual terms exact testimony that has taken place in this case, of which I gave the four illustrations which I have cited to your Honor. I [261] have no recollection of those words.

The Court: Did you say that all rules of evidence have to be scrapped or the Government can't make a case and just make up the rules as they go along, or words to that effect?

Mrs. Bouslog: No, your Honor. I explained in the substance of my speech that I paraphrased for the laymen the rules of evidence contrasted with the kind of offered evidence by the prosecution in Smith Act cases, all of which is set forth in the memorandum to your Honor in which it is shown that there is a great—that the prosecution seeks great leeway from the ordinary rules of evidence.

The Court: You realize that this trial is still pending?

Mrs. Bouslog: Yes, your Honor.

The Court: And has been pending now for six weeks?

Mrs. Bouslog: Yes, your Honor.

The Court: That you are counsel of record?

Mrs. Bouslog: Yes, your Honor. And may I say, your Honor, that I think there is not one word of what I said at Honokaa that is in any way, that in any way shows any contempt for this Court, that my remarks were directed, as I said, primarily to the conduct of the prosecution in a Smith Act case.

Exhibit A—(Continued)

And, of course, more learned and more prominent people than I have said much stronger things concerning the [262] techniques of the prosecution in all Smith Act cases beginning with the Dennis case and all of the pending cases. And those remarks in context were directed generally to the Smith Act cases. Only the specific illustrations from this trial related factually to what goes on in this courtroom.

The Court: Well, Mrs. Bouslog, I am not satisfied with your explanations to the Court. I think this matter requires further investigation. I am going to instruct the U. S. Attorney to make a further investigation of this matter and if he finds under the provisions of Rule 42(b), a Notice and Order to Show Cause should issue, then he will do so.

Mrs. Bouslog: I will say to the Court that I am happy to have any investigation made of what I said. I think perhaps that it is rather unfortunate that the Court refers it to the prosecution whose conduct I was criticizing in the case rather than to an impartial person.

The Court: Well, in that respect, Mrs. Bouslog, if you feel that there is any partiality on the part of the U. S. Attorney, I have no reluctance whatsoever to refer the matter to an independent attorney. I think you should know that throughout this trial I have done everything that I could to assure to the defendants a fair trial. Counsel for the defendants naturally have disagreed with me on some of my rulings on evidence. That is only natural.

Exhibit A—(Continued)

Or the admission of documents in evidence. But in every other matter there has come [263] up since the time the jury was selected, the matter of fair play on giving the defendants the benefit of the doubt, I have almost consistently done so. It is very surprising to me to read this article in the newspaper after one of your associate counsel, Mr. Wirin, took occasion a week or so ago to come to my chambers during a recess and state that he had been advised or had heard—I didn't ask him the source of his information—that Judge Wiig would not give the defendants a fair trial, and he wanted to state to me at that time that in his opinion the deefndants were receiving a fair trial. Again, Mrs. Bouslog, I have done everything I could in this trial to prevent any outside influences from entering into the presentation of evidence and the matters that go to the jury. So when this case is in their hands it will be decided upon the evidence and what has taken place here in the courtroom.

This publication in yesterday afternoon's paper is the first that I have seen which is contrary to what I had hoped for, what I had hoped would continue throughout the trial. The factual reporting of the principal or the Honolulu Advertiser and the Honolulu Star Bulletin had been, I think, fair. I have noticed no editorial comment or other comments which would in any way have an effect upon giving a fair trial to these defendants. And this caused a great deal of concern when it was called to my at-

Exhibit A—(Continued)

tention by Mr. Walsh yesterday afternoon. I trust that nothing will happen from here [264] on which will affect this trial in any way. Will you please call the jury?

Mr. Barlow: Am I to understand, your Honor, that I am going ahead with the investigation?

The Court: Yes.

ALBERT GRAIN.

September 21, 1954. [265]

EXHIBIT B

In the United States District Court
for the District of Hawaii

Cr. No. 10,495

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES KAZUYUKI FUJIMOTO, et al.,
Defendants.

SUPPLEMENTAL GROUND OF MOTION FOR NEW TRIAL AND AFFIDAVITS IN SUPPORT THEREOF

Pursuant to Rules 29(a) and 33 of the Federal Rules of Criminal Procedure, the defendants each

Exhibit B—(Continued)

for himself and for the others hereby move the Court to grant a new trial upon the following ground in addition to those already set forth in their motion for new trial pursuant to leave of Court given and order entered thereon the morning of June 30, 1953:

In the interests of justice the Court should grant a new trial for the reason that the jury did not determine the innocence or guilt of the defendants upon an individual basis, nor merely upon evidence properly applicable to such defendants respectively, nor merely upon evidence received in the case; that the consent of certain jurors to the verdicts was secured through mental coercion and expressions designed to induce and actually inducing fear; that matters clearly improper and [267] extraneous to any issue before the jurors were discussed as a part of the jurors' deliberations; that contrary to the Court's instruction to the jury to take its time and give adequate consideration, certain jurors demanded and insisted upon haste; that the requests of certain jurors for a consideration of all the evidence, including the evidence introduced by the defendants, were sidetracked and rejected, and the jurors never di' give consideration or deliberation to the testimony and evidence introduced by the defendants; that certain jurors insinuated into the discussions in the jury room matters relating to other cases not in any way involved in or properly constituting a part of the evidence or issues entrusted to the jurors in this proceeding by the

Exhibit B—(Continued)

Court under the instructions; that certain jurors, contrary to the express admonitions and instructions of the Court, selected a single instruction and confined the discussions and deliberations of the jurors to that instruction in determining whether there was a conspiracy as charged in the indictment; that the verdicts of the jury were produced by passion and prejudice and fear of consequences to the jurors themselves.

This supplemental motion is and will be based upon the entire record and files in the case, the affidavits attached hereto and evidence to be offered at the hearing in support hereof.

Dated: Honolulu, T.H., this 1st day of July, 1953.

/s/ RICHARD GLADSTEIN,

Attorney for Defendants Charles Kazuyuki Fujimoto, Dwight James Freeman, Eileen Toshiko Fujimoto and John Ernest Reinecke; [268]

/s/ MYER C. SYMONDS,
Attorney for Defendant Jack Wayne Hall;

/s/ HARRIET BOUSLOG,
Attorney for Defendants Jack Wayne Hall and John Ernest Reinecke;

/s/ A. L. WIRIN,
Attorney for Defendants Koji Ariyoshi and Jack Denichi Kimoto. [269]

Exhibit B—(Continued)

[Title of District Court and Cause.]

Cr. No. 10,495

AFFIDAVIT OF ELLEN FULLER CABREROS

Territory of Hawaii,
City and County of Honolulu—ss.

I, Ellen Fuller Cabreros, being first duly sworn, on oath depose and say:

I live at 3340-B Monsarrat Avenue, Honolulu, City and County of Honolulu, Territory of Hawaii.

I am the sister of David P. Fuller, who sat as a juror in the case of United States v. Fujimoto, et al.; my brother resides at 1734 Colburn Street in the Kalihi area of Honolulu.

A verdict of guilty was returned in this case on June 19, 1953.

On Friday, June 26, 1953, I went to visit my mother, who resides at 1733 Dillingham Boulevard, immediately adjoining the place where my brother lives; my mother told me that ever since the verdict my brother had been very ill and that [270] he kept saying that he wanted to confess to the Judge that the case was a frameup and that he had lied in the sight of God.

I went to my brother's house to see him and found him seriously ill in bed, scarcely able to talk; from what my mother had told me and from what my sister-in-law and sister had told me about my

Exhibit B—(Continued)

brother I felt he had something on his conscience and needed help and that he would not get well until he got the matter off his chest.

With the permission of my sister-in-law I called Attorney Harriet Bouslog and asked her to come to see my brother; she came to my brother's house at about 6:00 o'clock p.m.; in my presence, Attorney Bouslog asked my brother if he had anything he cared to say and he said he did; I heard him say that the case was a frameup and it was not a true verdict, and he wanted to get a clear conscience; he was unable to speak above a whisper; my sister-in-law in my presence said that he had lost his voice because he had been shouting earlier in the day and on previous days since the return of the verdict about the case being a frameup and the defendants being innocent.

After Attorney Bouslog had sat with my brother for a short time, in my presence and in the presence of Mrs. Fuller, a Dr. Chang arrived to see my brother; when Dr. Chang came into the bedroom I was present and he asked my sister, his wife, Mrs. Fuller, what was the trouble with Mr. Fuller and my sister-in-law, Mrs. Fuller, explained that he had been ill since the verdict in the Smith Act trial because he thought [271] it was a frameup; I heard my brother tell the doctor it was a frameup; I left the room during the time my brother was being examined by the doctor.

After the doctor left, my sister-in-law, Mrs. Fuller, said that the doctor said there was nothing

Exhibit B—(Continued)

physically wrong with my brother, and that the doctor gave him no medicine, but that if he did not get up to use the bathroom he would have to be taken to the hospital.

After the doctor left, Attorney Bouslog in my presence and in the presence of my sister-in-law, Mrs. Fuller, and Grace Oshiro, asked my brother if he would like to see Jack Hall and if that would make him feel better; he nodded that he would; he said he wanted to talk about it and he wanted to see anybody anytime to get the matter off his conscience; for the first time he appeared to feel better and sat up, asked for a pillow under his head and a cigarette and water; shortly thereafter Attorney Bouslog said in my presence to my sister-in-law that she thought it would be better for my brother to rest; that she would bring Jack Hall to see him the next day if he felt well enough and wanted to see him.

I went to my brother's house the following day, Saturday, June 27, and was present at the time when Attorney Bouslog and Jack Hall were there; my brother seemed much better and was dressed and sitting in the living room; his voice, however, was still only a whisper; I was not, however, present at the time when Attorney Bouslog and Jack Hall arrived, but came later; when Jack Hall and Attorney Bouslog started to leave he told my brother goodbye; my brother told me, Jack Hall and Attorney Bouslog, "Don't leave, don't leave," and repeatedly asked us not to leave. [272]

Exhibit B—(Continued)

I have read the affidavits of Attorney Bouslog and Jack Hall and insofar as they tell about things that happened in my presence they are true to the best of my knowledge.

/s/ ELLEN FULLER CABREROS.

[Notarized June 29, 1953.] [273]

[Title of District Court and Cause.]

Cr. No. 10,495

AFFIDAVIT OF HARRIET BOUSLOG

Territory of Hawaii,
City and County of Honolulu—ss.

I, Harriet Bouslog, being first duly sworn, on oath depose and say:

On Friday evening, June 26, 1953, shortly before 6:00 o'clock I received a telephone call at my home from Ellen Fuller Cabreros, sister of David P. Fuller, who sat as a juror in the case of United States v. Fujimoto, et al. Mrs. Cabreros asked me if I could come and see her brother; that he was seriously ill.

I went to the Fuller home at 1734 Colburn Street and was taken by Mrs. Cabreros and Mrs. Fuller into the front bedroom where Mr. Fuller was lying in bed. He appeared to be gravely ill.

I talked with his wife, Helen Fuller, in the living room of their home in the presence of Ellen Fuller Cabreros [274] and her friend, Grace Oshiro, and

Exhibit B—(Continued)

two of the Fuller children. All members of the family present were upset and in tears at the state of Mr. Fuller. Mrs. Fuller stated that she had called a doctor to examine her husband and informed me that her husband had been ill since the return of the verdict, and particularly since early in the morning of Saturday, June 20, 1953, the morning after the verdict was returned.

Mrs. Fuller said that on Saturday morning, the day immediately following the verdict of guilty in the Smith Act case, at about five o'clock in the morning, she found her husband on his knees praying, begging God for mercy, saying he had sinned, that he had lied in the eyes of God; that Jack Hall was innocent and the case was a frameup; that Jack Hall is a good man; that those people are doing good for humanity and here someone is trying to block them. She said that in the time since, her husband had told her that the jury only looked at the Government's case and scarcely talked at all about the defendants' side and their case; that he asked her and the children to forgive him because he had done something wrong and it was too late; he said that one of the jurors said the defendants were innocent, and when the other jurors said "Guilty, guilty," that juror threw a book across the room and said they just as well forget about it. Mrs. Fuller said that her husband had wanted to go see the Judge and confess that he had lied, and once or twice tried to leave the house, but was too upset mentally and physically and unable to

Exhibit B—(Continued)

leave the house by himself; that he fell and struck his head. She said that [275] she and other members of her family urged him not to do anything, not to go to the Judge and to forget about it, that he would only get himself in trouble and would get them in trouble, and that he might go to jail.

Mrs. Fuller said that when he tried to leave and was unable to, she and other members of the family put him back in bed and tried to keep him quiet; that he kept shouting and crying and praying, saying that the case was a frameup, that he had done wrong, and told the children and her to stay away from him because he was not clean. She said that his condition seemed to get worse and worse as the days went by until on Friday, June 26, 1953, all day he was in bed and did not move or get up at all, and his voice became scarcely a whisper because he was hoarse from the shouting on previous days.

After the conversation with Mrs. Fuller, I went in the bedroom where Mr. Fuller was and asked him if he wished a drink of water. He nodded that he did. During this time, Mrs. Fuller, his sister and her friend were present in the room. Mr. Fuller struggled to talk and make himself heard, but because of his weakened physical condition and the loss of his voice, it was difficult to understand what he said. He stated understandably, however, that he wanted help and wanted to get a clear conscience and get the wrong he had done straightened out.

Shortly after my arrival, a Doctor Chang arrived. I was not present in the bedroom during the

Exhibit B—(Continued)

conversation between Dr. Chang and Mrs. Fuller, although I could hear the conversation between Dr. Chang and Mrs. Fuller from [276] the living room. After Dr. Chang had talked to Mrs. Fuller, Mrs. Fuller told me that the doctor said after examining her husband that there was nothing physically wrong with him, that he would have to rest in bed, and that it might be necessary to take him to a hospital unless he would get up to go to the bathroom.

After the doctor had left, in the presence of Mrs. Fuller, Mrs. Cabreros and her friend, Grace Oshiro, and Mrs. Fuller's oldest daughter, I gave Mr. Fuller water and he was propped up in bed. Again he tried to talk, but seemed to find difficulty in doing so. He said he wanted to talk about the matter and would talk to Jack Hall or anyone at any time to get a clear conscience.

Shortly after this I left, believing Mr. Fuller needed rest.

I made arrangements with Mrs. Fuller and Mr. Fuller to come to see him the next day with Jack Hall.

On Saturday morning I was informed by Mrs. Cabreros that her brother was feeling considerably better and wanted to and would be able to see us.

When Mr. Hall and I arrived at the Fuller home about 1:00 o'clock Saturday afternoon, June 27, Mr. Hall put out his hand to Mr. Fuller. Mr.

Exhibit B—(Continued)

Fuller looked at Mr. Hall for a long time and finally took his hand. Mr. Hall told Mr. Fuller he did not hold anything against him; that he just wanted Mr. Fuller to get well.

Mr. Fuller said to Mr. Hall that from the talk of guilty by other jurors in the jury room, he believed he had to vote guilty to protect his brothers because he was afraid they would be fired if he did not. Mrs. Fuller said that both of Mr. Fuller's brothers, Leonore and Harry, worked for Isle-Ways. Mr. Fuller said that it wasn't right that they only looked at Government exhibits and not at the [277] defendants' exhibits or case. He said it was a frameup and said he blamed himself. He said that they looked at Government exhibits and any time someone suggested looking at defense exhibits some juror would say, "Later, later," and they never got around to it. He said that he knew and believed the defendants were innocent all the time but was afraid of what would happen if he voted not guilty.

He said that the jury in their deliberations decided that the Communist Party was a conspiracy within the first hour after they began their deliberations. He said that the instruction of the Judge which they used to decide this was the one which told them first to decide whether there was a conspiracy, and they decided the Communist Party was a conspiracy. He said he knew from what he heard the defendants were convicted before the case

Exhibit B—(Continued)

started on ideas the jurors had before the case started. He said he heard two jurors tell the Judge that they were opposed to Communism during the examination. He said that no secret ballots were taken, so everyone knew how each juror voted. He said some of the jurors said the Government wouldn't bring the charge if it wasn't true. He said that at some time he heard it said that if the defendants weren't convicted it would affect Hawaii's getting statehood. He said that the jurors on the side of the Government said that anybody who was a member of the Communist Party must know what its purposes are and are guilty.

He said that the jury wanted Kawano's testimony. He said that jurors on the defense side asked for Kawano's testimony to show that none of the defendants ever talked about overthrowing or destroying the government. [278]

He said that one juror said a number of times during the deliberations that he had to go to the Mainland and that they should get it over with.

He said that if he voted for the defendants he was afraid the other jurors would tell about it and it would hurt his family. He said one of the jurors played cards in the jury room. He said that there was anger and shouting in the jury room between the persons who were for the prosecution and those who were for the defense. Particularly the jurors for the prosecution got angry with the ones who were holding out.

He said they didn't take any secret ballot, but

Exhibit B—(Continued)

anybody on the defendants' side had to speak up and then the others would try to get them to back down. He said that he heard jurors talk about Attorney Gladstein and said he was too smart and that he had defended the Communists in New York and had served a jail sentence. He said that he heard some of the jurors talk about the war against Communism. He said that they didn't consider the character evidence for the defendants.

He said the second thing the jury decided was that all defendants were members of the Communist Party. Te next thing they decided was that if they were Communists they must have intended to overthrow the government. He said that he himself did not believe Kawano and he heard others say they did not believe Muller. He said he heard jurors talk about sabotage and espionage. He said that after they asked for the instructions they used the one which told [279] them to decide first whether there was a conspiracy, and right off they decided there was, and then talked about whether defendants were members of the Communist Party. He said there was a lot of talk about Bailey.

After this conversation took place, when Jack Hall and I started to leave, Mr. Fuller begged Mr. Hall not to leave and raised his hands above his head and appeared to be praying, although the words were not audible. Before leaving, Mr. Hall tried to quiet Mr. Fuller and helped Mrs. Fuller put her husband in bed.

Mr. Hall and I again went to see Mr. Fuller on

Exhibit B—(Continued)

Sunday, June 28, shortly after 1:00 o'clock in the afternoon. We were accompanied on this occasion by Joseph Kealalio. When we arrived, Mr. Fuller was sitting in a chair in the living room. He kept looking at Mr. Hall but did not speak.

After conversing with Mrs. Fuller for a very short period of time, we came to the conclusion that it would be better to wait until Mr. Fuller was in better physical and mental condition.

When Mr. Hall started to leave, Mr. Fuller again pleaded with him not to leave.

Further affiant saith not.

/s/ HARRIET BOUSLOG.

[Notarized July 1, 1953.] [280]

[Title of District Court and Cause.]

Cr. No. 10,495

AFFIDAVIT OF JACK WAYNE HALL

Territory of Hawaii,
City and County of Honolulu—ss.

I, Jack Wayne Hall, being first duly sworn on oath, depose and say:

I visited David P. Fuller at his home on Saturday, June 27, 1953, accompanied by Attorney Harriet Bouslog, and on Sunday, June 28, 1953, accompanied by Harriet Bouslog and Joseph Kealalio. I have read the affidavit of Harriet Bouslog describ-

Exhibit B—(Continued)

ing what took place on the occasion of these visits and the facts stated in her said affidavit are true.

Further affiant saith not.

/s/ JACK WAYNE HALL.

[Notarized July 1, 1953.]

Receipt of copies acknowledged.

[Endorsed]: Filed December 2, 1955. [281]

[Title of Supreme Court and Cause.]

SUGGESTION OF DISQUALIFICATION
(Re Justice Stainback)

Comes now the respondent above named and suggests to this Honorable Court the disqualification of Mr. Justice Stainback to participate in this cause for the reason that he has a personal bias and prejudice against respondent, has expressed an opinion contrary to the position of respondent and in favor of the position of the Bar Association and the Attorney General herein, and has prejudiced issues of fact and law necessary to be determined by this Court in this cause.

This Suggestion is based upon the Affidavit of Harriet Bouslog and the Memorandum of Points and Authorities annexed hereto and upon all papers, records and files in this proceeding.

Dated: Honolulu, T.H., this 11th day of January, 1956.

Respectfully submitted,

Exhibit B—(Continued)

/s/ JOHN T. McTERNAN,
/s/ MYER C. SYMONDS,
Attorneys for
Respondent. [292]

[Title of Supreme Court and Cause.]

AFFIDAVIT OF HARRIET BOUSLOG

Territory of Hawaii,
City and County of Honolulu—ss.

Harriet Bouslog, being first duly sworn, on oath deposes and says:

1. I am an attorney at law duly licensed to practice before this Court and all courts of the Territory of Hawaii, as well as the United States District Court for the District of Hawaii. I am the respondent in this cause.

2. Attached hereto marked Exhibit "A" and by this reference made a part hereof is an excerpt from the testimony of Mr. Justice Stainback before the Committee on Interior and Insular Affairs, United States Senate, on January 8, 1954, taken from page 1113 of the stenographic transcript of the hearings before that Committee on that date.

3. The lawyer referred to in said excerpt is, and was intended by Mr. Justice Stainback, to be, affiant, and the federal judge there referred to is, and was intended by Mr. Justice Stainback to be, the Honorable Jon Wiig, District Judge for the United States District [293] Court for the District

Exhibit B—(Continued)

of Hawaii. The statement attributed to affiant referred to and described, and was meant by Mr. Justice Stainback to refer to and describe, the speech allegedly given by affiant at Honokaa, Hawaii, on or about December 14, 1952, said speech being the same as that referred to in the report of the Legal Ethics Committee herein.

4. In making the statements set out in Exhibit "A," Mr. Justice Stainback meant to say, was underscored to say, and did say, that affiant in her Honokaa speech stated that Judge Wiig was not giving and would not give a fair trial in the matter then pending before him, and that affiant made that statement as part of an attempt by her and others to bring discredit upon all courts in the Territory of Hawaii, including the United States District Court therein.

Further affiant sayeth not.

/s/ HARRIET BOUSLOG.

Subscribed and sworn to before me this 11th day of January, 1956.

[Seal] /s/ EDWARD H. NAKAMIERA,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires May 19, 1958.

We hereby certify that the foregoing affidavit is made in good faith.

/s/ JOHN T. McTERNAN,
/s/ MYER C. SYMONDS. [294]

Exhibit B—(Continued)

Exhibit "A"

Stenographic Transcript of Hearings Before the Committee on Interior and Insular Affairs, United States Senate—January 8, 1954, pp. 1112-1113.

Senator Kuchel: * * * Again I wonder whether you suggest that circulation of that pamphlet in the courts of the Territory should be used as another argument against Hawaiian statehood.

Governor Stainback: I think it shows the extent to which the Communist people down there attempt to raise race prejudice and attempt to bring into disrepute the courts of the Territory. The lawyer actually goes out and says, "You cannot hope for justice before this Judge." And that was a federal judge.

The whole conduct was brought in to bring into contempt the courts and administration of justice. It is like Mr. Jack Hall's pamphlet which I referred to yesterday, when I removed him from police commissioner. I think the whole thing is part of an attempt to discredit the courts of the Territory. [295]

Points and Authorities

1. The affidavit of bias and prejudice meets the requirements of the statute.

Section 9573, Revised Laws of Hawaii, 1945.

2. When an affidavit of disqualification is filed, it becomes the duty of the court to determine its legal sufficiency on the basis of the facts therein

Exhibit B—(Continued)

stated. In doing so, the court is not permitted to give any consideration to the truths or falsity of the facts charged; the facts alleged must be assumed to be stated. And when tested in that manner, if the affidavit and accompanying certificate of counsel meet the requirements of the statute, the judge can proceed no further; he stands excused.

Berger v. United States,
255 U.S. 22, 65 L. ed. 481;

Nations v. United States,
14 F. 2d 507 (C.C.A. 10, 1926), Cert. den. 273 U.S. 135;

Whitaker v. McLean,
118 F. 2d 596 (Ct. of App., D.C., 1941);

Schmidt v. United States,
115 F. 2d 394 (C.C.A. 6, 1940);

Moskun v. United States,
143 F. 2d 129 (C.C.A. 6, 1944);

Connelly v. United States,
District Court (C.C.A. 9), 191 F. 2d 692.

Dated: Honolulu, T.H., this 11th day of January, 1956.

Respectfully submitted,

/s/ JOHN T. McTERNAN,
/s/ MYER C. SYMONDS,
Attorneys for Respondent.

Receipt of copies acknowledged.

[Endorsed]: Filed January 11, 1956. [296]

[Title of Supreme Court and Cause.]

SUGGESTION OF DISQUALIFICATION OF THE HONORABLE PHILIP L. RICE, ASSOCIATE JUSTICE

Comes now the respondent above named and suggests to this Honorable Court the disqualification of Mr. Justice Rice to participate in this cause for the reason that he has a personal bias and prejudice against respondent and in favor of the complainant, the Bar Association of Hawaii.

This Suggestion is based upon the Affidavit of Harriet Bouslog and the Memorandum of Points and Authorities annexed hereto and upon all papers, records and files in this proceeding.

Dated: Honolulu, T.H., this 11th day of January, 1956.

Respectfully submitted,

/s/ JOHN T. McTERNAN,
/s/ MYER C. SYMONDS,
Attorneys for
Respondent. [298]

[Title of Supreme Court and Cause.]

AFFIDAVIT OF HARRIET BOUSLOG

Territory of Hawaii,
City and County of Honolulu—ss.

Harriet Bouslog, being first duly sworn, on oath deposes and says:

1. I am an attorney at law duly licensed to prac-

tice before all courts in the Territory of Hawaii and the United States District Court for the District of Hawaii, and a member of the firm of Bouslog & Symonds with offices in Honolulu, T.H. I am the respondent in this proceeding.

2. Mr. Justice Rice of this Court has a personal bias and prejudice against me by virtue of which I believe him to be disqualified to participate in this proceeding. The existence of this bias and prejudice appears from the facts set out below.

3. For the period from on or about November 1, 1946, to in or about January, 1948, I personally was attorney for the International Longshoremen's and Warehousemen's Union, herein called the ILWU, in the Territory of Hawaii. From the latter date and continually down to the present my firm has served as such attorneys and I have actively handled many matters for and on behalf of the ILWU. [299]

4. The ILWU is a labor organization comprised of approximately 25,000 workers in the Territory engaged in the sugar, pineapple and longshore industries as well as in numerous miscellaneous businesses. In the period beginning in 1944 and continuing through the year 1949, the ILWU carried on its major organizational activities in establishing its membership among the workers in the aforesaid industries and in establishing itself as the collective bargaining representative of said workers. These activities were resisted by the employers in said industries, and the conflict of interest between the

ILWU and its members on the one hand and the employers in said industries on the other led to and caused many bitter and protracted labor disputes marked by strikes, picketing, efforts to break said strikes, and claims of violence on the part of both sides to said controversies. As a result thereof, much litigation has ensued involving efforts to enjoin or limit picketing, criminal charges against strikers, and efforts to enjoin activities of law enforcement agencies and judges, including the Honorable Philip L. Rice, when judge of the Circuit Court of the Fifth Judicial Circuit. I, as one of the counsel for the ILWU, represented it and many of its members in the aforesaid litigation, including litigation directed against Circuit Judge Rice, as will more fully appear below.

5. By reason of the activities aforesaid, the ILWU has been opposed, criticized and denounced by virtually all of the leading industrial, financial, commercial, political and service organizations in the Territory and by individuals connected with and acting on behalf of such organizations. So prevalent and extensive have such opposition, criticism and denunciation become that the existence and activities of the ILWU have been asserted as a basis for denying statehood to the Territory by many prominent individuals of the Territory, including one of its past governors.

6. Of the above-named industries whose employees were organized by the ILWU as aforesaid,

the sugar industry is the [300] largest. In that industry the employer known as Lihue Plantation Company, herein called Lihue, is and at all times herein mentioned was one of the largest sugar companies in the Islands. During the period from 1946 through 1949, the family of Mr. Justice Rice (excluding Mrs. Rice) held substantial quantities of stock in Lihue and in American Factors, Ltd., which in turn owned a majority of stock in Lihue. For a period of approximately twenty-five years prior to his accession to the bench in 1943, Mr. Justice Rice had been retained by Lihue as its general counsel. In addition, Mr. Justice Rice is now and for a substantial period last past has been a member of the Republican Party, member and past Territorial Commander of the American Legion and a member of the Kauai Chamber of Commerce. Each of said organizations has opposed, criticized and denounced the ILWU as aforesaid.

7. On or about September 1, 1946, as part of its activities aforesaid in the sugar industry, the ILWU began an industry-wide strike against all sugar companies whose workers it represented, including the Lihue Plantation Company. On or about September 17, 1946, Mr. Justice Rice, at the request of the Lihue Plantation Company, issued, ex parte, an injunction limiting picketing and other activities by members of the ILWU in said strike (Equity No. 120 in the Circuit Court of the Fifth Judicial Circuit).

Shortly thereafter, Jack W. Hall, Regional Director of the ILWU, issued and caused to be circulated

a mimeographed leaflet which, inter alia, characterized Mr. Justice Rice as a "lawless judge" engaged in an effort to break the strike of the ILWU. A copy of said leaflet is attached hereto and marked Exhibit "A."

The issuance of said leaflet and the attack upon Mr. Justice Rice immediately became and continued to be a subject of public controversy. Editorials, such as those attached and marked Exhibit "B," attacking the ILWU and defending Mr. Justice Rice, appeared in the press. The Bar Association of Hawaii, complainant in this cause, adopted the following resolution on or [301] about October 12, 1946, condemning Jack Hall's statement and supporting Mr. Justice Rice:

Whereas the fairness, integrity and character of the Honorable Judge Philip L. Rice has been attacked in a broadside issued over the name of Jack W. Hall, regional director, International Longshoremen's and Warehousemen's Union in a matter which is now pending before said judge; and

Whereas this association recognizes that judicial officers, like any other public officers, are and should be subject to public criticism, and that there should be the greatest freedom in the public discussion of any and all matters relating to the problems of society, including the administration of justice, but that in pending matters the courts must be free of intimidation and public clamor; and

Whereas the association has the fullest confidence in the integrity and impartiality of the Honorable Philip L. Rice; and

Whereas this association has been formed, in the words of its constitution, "to promote and maintain a high standard in the constitution of the courts and in the administration of justice" and all of its members are bound by the canons of professional ethics to defend the judges against unjust criticism and clamor,

Now, Therefore, Be It Resolved that without in any manner passing upon the merits of the pending legal controversy, it is the sense of the Bar Association of Hawaii, in adjourned annual meeting assembled, that the attack on the Honorable Judge Philip L. Rice be condemned as going far beyond fair criticism and constituting a scurrilous attack on his judicial integrity tending to obstruct the orderly judicial processes in this Territory.

8. On or about October 29, 1946, twelve leaders in the aforesaid strike were indicted by the Grand Jury of the Fifth Circuit Court and charged with the felony of contempt, punishable by a maximum two years' imprisonment for violation of the aforesaid ex parte injunction issued by Mr. Justice Rice. Respondent first appeared before Mr. Justice Rice as attorney for these twelve strike leaders on November 26, 1946. At that time there was pending in this Court a Writ of Prohibition against Judge Wirtz of the Circuit Court of the Second Judicial Circuit, involving the same issues as the proceeding before Mr. Justice Rice, i.e., the validity of an ex parte restraining order limiting peaceful picketing

and the power of territorial courts to [302] issue injunctions in labor disputes. Mr. Justice Rice persistently refused respondent's request to continue said criminal contempt proceedings until the test suit in the Wirtz matter could be determined on appeal.

9. Upon this refusal by Mr. Justice Rice, respondent filed in the United States District Court for the District of Hawaii against him and the Attorney General of Hawaii an action for injunction alleging violation of the civil rights statute of the United States, said action being designated Constancio R. Alesna, et al., v. Philip L. Rice, et al., Civil No. 769, in the records of that court. It was the burden of said action that Mr. Justice Rice had engaged in a course of conduct in violation of plaintiff's rights under federal laws and the constitution and had injured, oppressed and intimidated plaintiffs in the free exercise and enjoyment of rights and privileges secured to them by the laws and Constitution of the United States. Mr. Justice Rice was represented in that action by the then Attorney General of Hawaii. The United States District Court for the District of Hawaii on January 31, 1947, issued an order to show cause against Mr. Rice and the Attorney General and a temporary restraining order prohibiting the Attorney General from proceeding further with the contempt indictment, and on February 21, 1947, issued a preliminary injunction with a similar restraint. That court's ruling of February 25, 1947, stated in part:

Now, should—or more pointedly—why should a preliminary injunction issue? Because in the absence of any Territorial law, and in the light of the definite Federal laws relating to permissible labor conduct—which laws the Territorial courts, too, must respect—there seems here to be a substantial question as to whether or not that which under Federal law may be allowable conduct can—by restrictions placed thereon by a court, however reasonable they might be—become, as the Supreme Court says, "the road to prison." (See U. S. vs. Hutcheson, 312 U.S. 219; Thornhill vs. Alabama, 310 U.S. 88; Hague vs. CIO, 307 U.S. 507.)

In brief, with no questions of Territorial law involved at all, it looks as if Plaintiffs are in jeopardy because they did things which Federal law allowed. Before exposing Plaintiffs to the risks of trial for criminal contempt of court, I believe the questions of law posed under these facts should be further examined. [303]

10. The preliminary injunction was later dissolved, and summary judgment entered for the defendant judge and Attorney General. Thereafter the aforesaid criminal contempt charges were reduced from two-year felonies to misdemeanors with a maximum penalty of thirty days. After this modification, the injunction against the Attorney General proceeding with the trial of the contempt cases was reinstated pending appeal. Despite the existence of

the restraints against the Attorney General, his officers and agents, forbidding them from proceeding with the contempt cases and making impossible any substantive steps therein, Mr. Justice Rice required the strike leaders so charged who resided in all parts of the Island of Kauai to appear personally before him on six or more occasions with the consequent hardship of losing work and caused counsel to come from Honolulu to appear with the defendants for the sole purpose of recording continuances of those proceedings.

11. In the spring of 1947 when the four-year term of Mr. Justice Rice as circuit judge was about to expire, the ILWU opposed his renomination and reappointment. This opposition was openly and vigorously presented by the Washington representative of the ILWU to the White House, the Democratic National Committee and the Senate judiciary committee. The fact of said opposition became a matter of public notoriety as is evidenced by an editorial in the Honolulu Star-Bulletin of September 27, 1951, entitled "Shabby Treatment for the Hawaii Judiciary," which reads in part as follows:

> On Kauai the term of Circuit Judge Philip L. Rice expired a month ago. He has not been reappointed nor is there any perceptible move in Washington to make that reappointment.
>
> Judge Rice has served two terms as circuit judge, faithfully and creditably.
>
> Kauai-born, a veteran of World War I, thoroughly trained in the law and with long expe-

rience in legal practice, he brought to the circuit bench of Kauai when first appointed in 1943 an already excellent record. He has added to that record, both as a jurist and as a citizen, in his two terms on the Kauai bench—he was reappointed in 1947 on the basis of his excellent record during his first term. [304]

The only criticism of any note ever made against Judge Rice's service on the bench came from the ILWU—and related to actions he took when cases were brought before him in industrial disputes.

In view of the proved record of the ILWU for fomenting industrial disorders, this criticism it has made, in years past, of Judge Rice, should serve as indirect but nevertheless powerful endorsement for his reappointment.

13. I have on many occasions during my work as counsel for the ILWU represented Jack Hall, who was named above and who is now and has been since 1944 Regional Director of the ILWU in the Territory. Since 1951 I have been one of the counsel representing Jack Hall in his prosecution for conspiracy to violate the Smith Act, said case being designated United States v. Fujimoto, et al., in the records of the United States District Court for the District of Hawaii.

14. In one of the incidents alleged in the Report of the Legal Ethics Committee herein, viz., my

alleged speech at Honokaa, Hawaii, T.H., I spoke at a meeting sponsored by the ILWU and appeared on the same program with the aforesaid Jack Hall. In the other incident alleged in said report I was accompanied by Jack Hall to the home of Juror Fuller on the occasion mentioned in my affidavit and referred to in said report when said Juror told Jack Hall that his verdict against him was the result of fear.

15. Because of my long identification with the ILWU and Jack Hall, who have publicly and openly criticized the actions and opposed the judicial appointments of Mr. Justice Rice, and because of the litigation brought by me against Mr. Justice Rice charging him with violation of the civil rights of members of the ILWU on the one hand, and Mr. Justice Rice's long association with employer interests in the sugar industry and organizations opposed to and critical of the ILWU on the other hand, and the defense by the complainant Bar Association of Mr. Justice Rice on the occasion of the public criticism made of him by Jack Hall, I believe my relationship with Mr. Justice Rice is so embedded in conflict involving the [305] antagonism of employer interests and working class interests that he has a bent of mind against me and a personal bias and prejudice towards me which make

it impossible for him to be impartial and to give assurance of impartiality in this proceeding.

Further affiant sayeth not.

/s/ HARRIET BOUSLOG.

Subscribed and sworn to before me this 11th day of January, 1956.

[Seal] /s/ EDWARD H. NAKAMIERA,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires May 19, 1958.

We hereby certify that the foregoing affidavit is made in good faith.

/s/ JOHN T. McTERNAN,
/s/ MYER C. SYMONDS. [306]

EXHIBIT "A"

A Lawless Judge Will Not Break the Sugar Strike
A Statement to the Public:

No company-minded judge, especially Phillip L. Rice, is going to crush the struggle of nearly one hundred thousand men, women and children, for a better life and control of their own destinies merely by issuing an injunction.

Judge Rice's issuing such an injunction after a private conference with the Lihue Plantation Company behind closed doors it not in keeping with the American sense of fair play. It was an outrageous thing to do. The proper procedure to have followed, and any fair-minded judge would have done so—would have been to call in both the Company and

the Union. To have then held a hearing on the facts before issuing such an arbitrary injunction. This is the procedure followed in fair courts.

This flagrant disregard for the basic principles of fair play is understandable, however, when you know that members of Judge Rice's family are stockholders of Lihue Plantation. It is understandable when you know that Judge Rice represented Lihue Plantation and other Big Five companies for many years as corporation counsel.

I personally sat opposite him in an earlier strike against Lihue Plantation where he represented that firm at the bargaining table.

Company Judge Rice's prejudice against the workers is great. His action in this injunction matter reeks with it. In his anxiety to assist the strike-breaking program of the employers, he ordered a temporary restraining order against the Union, even though the Lihue Plantation Company did not ask for such an order in its petition. That is the height of prejudice.

It is customary in injunction proceedings where property rights are involved to require the petitioner to post a substantial bond. The property rights of the workers—their job rights—are involved in this proceeding, but Judge Rice did not even think it necessary to require the Company to post a bond as evidence of good faith.

Hearing on the injunction is set for ten days hence—ten days in which the employers can develop their strike-breaking plans without the moral persuasion of perfectly legal picketing. Usually in-

junctions are returnable in 3 to 5 days. That, apparently, is not enough time for the employers, so Judge Rice conveniently allowed them 10 days.

The Judge's order is so vague, broad and all-inclusive that it is practically meaningless. It is aptly described as a mass of glittering generalities. Its language is so cloaked with uncertainties that no worker can reasonably be expected to know what he may and what he may not do.

The ILWU believes that the laws of the land should be lived up to by everybody, including judges. But there is a vast difference between the law and privately issued, one-sided edict of a lawless judge.

JACK W. HALL,
Regional Director, International Longshoremen's and Warehousemen's Union. [307]

EXHIBIT "B"

Page Eight Tuesday, September 24, 1946
The Garden Island
Issued Every Tuesday
Entered as Second-Class Matter July 1, 1904, at the Post Office, Lihue, Kauai, Hawaii, Under the Act of March 3, 1879.
C. I. Fern Editor

The Garden Island Honor Roll
Of Employees in Service
Pvt. Tetsuo Miyake, Killed in Action
June 2, 1944, Italy
Pvt. Henry T. Uchiyama
Pvt. Elmer Keahi

Exhibit B—(Continued)

A Bad Day for Hawaii

The recent action of a Honolulu ILWU labor leader in issuing a handbill attacking Judge Rice and his recent action in issuing a restraining order against the Lihue unit of the ILWU has caused considerable comment. The Garden Island feels that any lengthy comment on the matter would be out of place as the matter of the injunction is still pending before the court.

However, it must be said that it is a bad day for Hawaii when a labor leader can be arrogant enough to believe that he has the right to assume the functions of the Territorial Supreme Court and pass upon the qualifications of a judge, and his interpretation of the law.

Page Eight Tuesday, October 15, 1946

The Garden Island

Issued Every Tuesday

Entered as Second-Class Matter July 1, 1904, at the Post Office, Lihue, Kauai, Hawaii, Under the Act of March 3, 1879.

C. I. Fern Editor

The Garden Island Honor Roll

Of Employees in Service

Pvt. Tetsuo Miyake, Killed in Action

June 2, 1944, Italy

Pvt. Henry T. Uchiyama

Pvt. Elmer Keahi

Exhibit B—(Continued)

Open Defiance of the Law Is Not the Solution

From all indications it would appear as if the ILWU is determined to show its disregard if not its outright contempt for the laws of Hawaii which it feels interferes with its operations. The action last week at Hanamaulu when the local unit of the ILWU openly defied a court order against mass picketing and staged a demonstration, was an excellent example of the strategy of the union. This, coupled with the recent broadside against Judge Rice, and the signs carried by the marchers in the parade held after the mass meeting at Lihue last month makes the tactics of the ILWU quite apparent.

It is possible that the ILWU's attitude will be to state that the injunction issued by Judge Rice is illegal and therefore they are quite within their rights in not obeying it. However it is the American custom that a decision of a court stands until it has been overruled by a higher court.

The danger in the ILWU's actions is not to the men involved who face the possibility of a prison sentence and the loss of their civil rights. The danger is to the rest of the community. Any community that has a group or class who feel they are above the laws that govern the remainder, must soon face a situation where this group or class will attempt to dictate to the remainder of this can lead to very serious consequences. Fascism in Italy and Nazism in Germany rose out of similar situations.

The unions obviously do not approve of laws

Exhibit B—(Continued)

which tend to prohibit mass picketing. However, if they are to keep the respect of the public, they must obey such laws until they have been set aside by the courts or repealed by the legislature. The unions will find that open defiance of the law is not the solution. [309]

Honolulu Advertiser November 21, 1946

The Boomerang Comes Home

The embarrassing thing about heaving political boomerangs is that the ancient Australian weapon has a habit of coming right back to the hand from which it was thrown. Case in point is the letter of Marshall L. McEuen, CIO-PAC director, castigating Territorial attorney general Nils Tavares for not accepting the offer of his organization to obtain more funds to operate the office as Mr. McEuen would have it operated. Principal charge by McEuen is that the attorney general is not doing his job and he claims to be speaking for many who want much more service than they have received.

Since no specific examples are given, except "failure of your office to give assistance to certain Territorial departments," the record has been examined for trace of Mr. Tavares' failure to perform.

We find neglect to take prompt action on law flouting, curiously perpetrated by the ILWU, alphabetical brother of the CIO-PAC.

We refer to the libelous attack on the integrity of Judge Philip Rice of Kauai, to those irrespon-

Exhibit B—(Continued)

sible strikers on both Kauai and Maui who flouted court orders against unlawful assembly, and who were able to secure continuation after continuation.

We refer to the unlawful second degree boycott instituted by the unions against various firms they do not like; to the actions of union leaders in Hilo aimed at preventing union membership in the Hawaii National Guard; to the speeches that various union leaders have made on Kauai, Maui and Hawaii which either were, or bordered dangerously near, "incitement to riot"; to the unwarranted high-handed beatings of supervisors at Lahaina.

ILWU policy has been to back those laws which were favorable to them and to ignore those which were not. They have gotten away with it so far.

It Is time the attorney general, with the backing of the governor, does something which will protect the rights of ordinary American citizens.

Why should any union—or any group of citizens—be privileged to violate the laws of the country and thumb their noses at established authority?

We, too, ask you, Mr. Tavares—and Mr. [310] Governor?

Points and Authorities

1. The affidavit of bias and prejudice meets the requirement of the statute.

Section 9573, Revised Laws of Hawaii, 1945.

2. When an affidavit of disqualification is filed, it becomes the duty of the court to determine its

legal sufficiency on the basis of the facts therein stated. In doing so, the court is not permitted to give any consideration to the truths or falsity of the facts charged; the facts alleged must be assumed to be stated. And when tested in that manner, if the affidavit and accompanying certificate of counsel meet the requirements of the statute, the judge can proceed no further; he stands recused.

Berger v. United States,
255 U.S. 22, 65 L. Ed. 481;

Nations v. United States,
14 F. 2d 507 (C.C.A. 10, 1926), Cert. den. 273 U.S. 135;

Whitaker v. McLean,
118 F. 2d 596 (Ct. of App., D.C., 1941);

Schmidt v. United States,
115 F. 2d 324 (C.C.A. 6, 1940);

Moskun v. United States,
143 F. 2d 129 (C.C.A. 6, 1944);

Connelly v. United States District Court,
(C.C.A. 9), 191 F. 2d 692.

Dated: Honolulu, T. H., this 11th day of January, 1956.

Respectfully submitted,

/s/ JOHN T. McTERNAN,

/s/ MYER C. SYMONDS,

Attorneys for Respondent.

Receipt of copies acknowledged.

[Endorsed]: Filed January 11, 1956. [311]

In the Supreme Court of the Territory of Hawaii,
October Term 1955

In the Matter of:

HARRIET BOUSLOG SAWYER, Also Known as HARRIET BOUSLOG, an Attorney at Law.

No. 3044

SUGGESTIONS OF DISQUALIFICATION OF JUSTICES STAINBACK AND RICE

Argued January 16, 1956.

Towse, C. J.; Stainback and Rice, JJ.

Decided January 19, 1956.

Judges—disqualification—bias and prejudice.

Section 9573 of the Revised Laws of Hawaii, 1945, relative to the disqualification of judges because of bias or prejudice does not apply to justices of an appellate court.

Same—same—same—timeliness of suggestion.

An affidavit to disqualify a judge because of bias or prejudice must be made before there has been any ruling on any litigated or contested matter whatsoever in the case either on motion, demurrer or plea of the party making the affidavit or motion, demurrer or other plea of any other party to the action, otherwise it is not timely made.

Same—same—same—affidavit must state facts and reasons.

An affidavit to disqualify a judge on the grounds of bias and prejudice must state facts and reasons [323] for the belief that personal bias and prejudice exist; it must state more than mere conclusions; the facts and reasons stated must logically support the conclusion of bias and prejudice. The bias or "prejudice" must be personal, that is, antagonism or opposition to the litigant or favoritism for his opponent.

Same—same—same.

Impersonal prejudice or bias resulting from a judge's background, association or experience is not sufficient to constitute prejudicial bias or even a prejudgment of the matters in controversy, but there must exist an attitude of personal enmity toward the party affiant or in favor of the adverse party to the detriment of the former.

Same—same—same.

In addition to section 84 of the Organic Act relating to disqualification for reasons of relationship, pecuniary interest or previous judgment, an appellate judge may sua sponte excuse himself from participating in a case where he feels that there are compelling moral reasons or where there exists in his own mind some real doubts as to the impartiality which he as an individual may exert on the matter before him as a judicial officer. [324]

OPINION OF THE COURT UPON SUGGESTIONS OF DISQUALIFICATION

By Stainback, J.

This matter involves a complaint of the Bar Association of Hawaii, under rule 19, filed July 8, 1954, against Harriet Bouslog Sawyer, a member of the bar of this Territory, which involves two charges: (1) That while appearing as counsel of record for certain defendants in a certain case in the United States District Court for the District of Hawaii, and during the trial of said cause, she made a speech at Honokaa, Hawaii, on December 14, 1952, at a public gathering wherein she is alleged to have severely criticized the court and the judge and alleged that unless the trial was stopped certain new crimes would be created by such trial; and (2) Alleged improper conduct in connection with her interview of a juror and her motion for a new trial in connection with the interview with such juror.

Thereafter there were filed the report of the legal ethics committee of the Bar Association of Hawaii, a number of memoranda including two by the Bar Association, one by J. Garner Anthony in behalf of Harriet Bouslog, and an answering memorandum on behalf of the Bar Association by William Barlow, all relating to the legal sufficiency of the charges; an order to show cause was filed July 8, 1955; a motion to dismiss the order to show cause was filed October 19, 1955. The motion to dismiss the order to show cause was heard and overruled,

as was a motion for reconsideration, with Mr. Chief Justice Towse dissenting as to those matters relating to the juror's affidavit. A return to order to show cause and a number of motions for continuance were filed. [325]

Thereafter, suggestions of disqualification of Associate Justices Stainback and Rice, and affidavits relative thereto, were filed on January 11, 1956, these suggestions being based upon section 9573 of the Revised Laws of Hawaii, 1945.

The first question is whether the provisions of section 9573, Revised Laws of Hawaii, 1945, are applicable to a justice of an appellate court. In Whittemore et als. v. Farrington et als., 41 Haw. 52, this court by a majority opinion held that such section is not applicable to a justice of the supreme court and we see no reason for overruling this holding.

The Hawaiian statute, as appearing in section 9573 of the Revised Laws of Hawaii, 1945, providing for the disqualification of judges on the grounds of personal bias or prejudice is a duplicate of the Federal Act approved March 3, 1911. (Chap. 231, 61st Cong. Sess. III, p. 1090.)

Section 9573 provides: "Disqualification of Judge; Bias or Prejudice. Whenever a party to any suit, action or proceeding, whether at law, in equity, criminal, or special proceeding, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of

any opposite party to the suit, such judge shall be disqualified from proceeding therein. Every such affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed before the trial or hearing of the action or proceeding, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any [326] case to file more than one affidavit; and no affidavit shall be filed unless accompanied by a certificate of counsel of record that the affidavit is made in good faith. Any judge may disqualify himself by filing with the clerk of the court of which he is a judge a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

The wording of the Act does not by specific provision include an appellate court and the construction of the federal statute has held that it does not apply to an appellate court.

"The statute authorizing affidavit of personal bias or prejudice of judge does not apply to the Circuit Court of Appeals." (Millslagle v. Olson, 128 F. [2d] 1015.)

In Duke v. Committee on Grievances of the Supreme Court, 82 F. (2d) 890, 895, it is stated: "Appellant some time ago filed in this court an affidavit under the provisions of section 21 of the Judicial Code (28 U. S. C. A. §25), charging all the judges of this court with personal bias and prejudice. Because we agreed with the Circuit Court of

Appeals in the First Circuit that the section does not apply to appellate tribunals, we rejected the affidavit. Kinney v. Plymouth Rock Squab Co., 213 F. 449."

"The only question considered in this case is whether or not section 21 applies to appellate courts and it is determined in this case that it does not." (Saunders v. Piggly Wiggly Corporation, 1 F. [2d] 582, 584, citing numerous cases.)

It is elementary that the adoption by the territorial legislature, as in this case, of a statute of another jurisdiction carries with it the judicial interpretation of the statute by that jurisdiction. (Territory v. Ota, 36 Haw. 80; Carter v. Gear, 16 Haw. 242, aff'd. 197 U.S. 348.) [327]

"Indeed, it is the well-settled general rule that when a statute is adopted from another state or country the judicial construction already placed on such statute by the highest courts of the jurisdiction from which it is taken is treated as incorporated therein so as to govern its interpretation." (50 Am. Jur., Statutes, §458, pp. 471, 472.)

However, assuming that the statute be applicable to justices of an appellate court, the suggestion of disqualification of a judge for bias or prejudice must be made before an appearance on the merits or before the submission of preliminary motions by either party preparatory to the trial or the objection is deemed waived. Such suggestions were not made in this case until after a number of rulings

relating both to important matters of substance as well as continuances. The statute specifically provides that such affidavit shall be filed before the trial or hearing of the action or the proceeding. Unless the matters of disqualification are unknown to the party at the time of the proceeding and are newly discovered, there can be no excuse for delaying the filing of the suggestion until after rulings are made in the matter, particularly where such rulings may be considered adverse to the movant.

"We hold that an affidavit of prejudice is timely made if filed and called to the attention of the court before it has made any ruling on any litigated or contested matter whatsoever in the case, either on a motion, demurrer, or plea of the party making the affidavit, or on the motion, demurrer, or plea of any other party to the action, of the hearing of [328] which the party making the affidavit has been given notice, otherwise it is not timely made. We cannot permit a litigant to test the mind of the trial judge like a boy testing the temperature of the water in the pool with his toe, and if found to his liking, decides to take a plunge. The plunge into the pool of litigation with an affidavit disqualifying the trial judge must be made on a belief of prejudice theretofore entertained, and not on any subsequent discovery of such belief of prejudice resulting from an adverse ruling." (State v. Armijo, 50 P. [2d] 852, 855.)

In Laughlin v. United States, 151 F. (2d) 281, where the affidavit was held back until after the

judge had ruled on sundry matters and after he had on appellant's request granted a continuance, it was properly held a waiver of appellant's statutory right to a consideration of his affidavit of prejudice.

Gregory v. Hartley, 113 U.S. 742, where the question was whether a petition for removal from a state court was timely filed, it was held under the wording of the statute that there cannot be a removal after a hearing on a demurrer to a complaint.

McGill v. Coomer, 309 Ky. 703, 118 Pac. 40, it was stated: "This Court has uniformly held that objection to a trial judge * * * is a question of jurisdiction and to be available must be made before an appearance to the merits of an action, or before the submission of preliminary motions by either party preparatory to a trial."

In State v. Superior Court, 114 Wash. 335, 195 Pac. 25, it was held that the motion to be timely must be made and [329] called to the attention of the court before it has made any ruling whatever in the case either on the motion of the party making the affidavit of prejudice or on the motion of any other party to the action.

A similar holding is that of State v. Clifford, 65 Wash. 313, 118 Pac. 40, and there are numerous other decisions to like effect, particularly in the Federal courts.

Thirdly, assuming that the statute does apply to justices of the supreme court and that the suggestions of disqualification were timely filed, we come to the merits of the affidavit alleging bias and prejudice upon the part of the justices.

An affidavit to disqualify a judge on the grounds of bias and prejudice must state facts and reasons for the belief that personal bias and prejudice exist and strict compliance with the statute is required. It must state more than mere conclusions; it must state facts and reasons which logically support the conclusion of bias and prejudice. Not one of the statements set forth in the affidavit for the disqualification of Mr. Justice Rice indicates personal bias or prejudice directly against the affiant herself. Such bias or prejudice to disqualify a judge must be specifically applicable to or directed against the party making the affidavit or in favor of his opponent. (Price v. Johnston, 125 F. [2d] 806; United States v. Valenti, 120 F. Supp. 80.) Impersonal prejudice resulting from a judge's background, association or experience is not prejudice within the meaning of the statute. (Eisler v. United States, 170 F. [2d] 273; Price v. Johnston, supra.) Such bias and prejudice are not personal if applicable to a class of cases or particular types of litigation. (United States v. 16,000 Acres of Land, etc., 49 F. Supp. 645.) [330]

"The interdiction of the law is not the mere possession of definite views regarding the law, or the conduct of a party, or even a 'prejudgment' of the

matters in controversy, but rather an attitude of personal enmity towards the party affiant, or in favor of the adverse party to the detriment of the former." (United States v. Valenti, 120 F. Supp. 80, 85.)

"Prejudice, to require recusation, must be personal according to the terms of the statute, and impersonal prejudice resulting from a judge's background or experience is not, in our opinion, within the purview of the statute." (Eisler v. United States, 170 F. [2d] 273, 278.)

The affidavit submitted as the basis for the suggestion of disqualification of Mr. Justice Rice purports to set forth facts which support the affiant's conclusion that he is biased and prejudiced, but it is noted that nowhere in said affidavit does the affiant state factually or even allege information and belief that Mr. Justice Rice has at any time or place ever by action exhibited, or by word spoken or written indicated, any personal bias or prejudice toward said affiant. Therefore, her statement therein that he "has a bent of mind against" her and "a personal bias and prejudice towards" her "which make it impossible for him to be impartial and to give assurance of impartiality in this proceeding," are merely suppositious.

While contending for legally sufficient assertion of facts and reasons for showing of personal bias and prejudice of Mr. Justice Rice, affiant bases her affidavit upon the cumulative effect of all actions

and conduct of the justice as [331] therein set forth; and, as in U.S. v. Valenti et al, 120 F. Supp. 80 (D. N. J., 1954) none of the items is, in the opinion of the court, sufficient legally to sustain the affidavit and "as it is axiomatic, that a whole can be no greater than its component parts, it must fail on this ground * * *."

Furthermore, as pointed out in the said Valenti case, supra, the affidavit to be sufficient must be based upon facts buttressed by reasons, and not a suppositious cumulative effect, "which is at best a mere conclusion arguendo."

Affiant makes her supposition and draws her conclusions that Mr. Justice Rice has a personal bias and prejudice against her from the fact that affiant had been the attorney for the ILWU for many years, that this is a labor organization of 25,000 workers and that there had been many labor disputes with their employers which had led to strikes, picketing and claims of violence on both sides to the controversy; that litigation had resulted to enjoin picketing and efforts made to enjoin activities of law enforcement agencies and judges, including Mr. Justice Rice when judge of the circuit court of the fifth judicial circuit, and that by reason of these activities the ILWU had been criticized and denounced by virtually all the leading industrial, financial, commercial and political organizations in the Territory. She further alleges that Lihue Plantation Company was one of the largest employers of ILWU members; that Mr. Justice Rice's family

(exclusive of Mrs. Rice) from 1946 to 1949 held substantial quantities of stock in Lihue Plantation and in American Factors' plantation which owned a majority of stock in Lihue, and that for a period of 25 years prior to his accession to the bench Mr. Justice Rice had been retained by Lihue as its general counsel. It further alleges that he has long been a member of [332] the Republican Party, of the Kauai Chamber of Commerce and of the American Legion, and that each of said organizations had opposed, criticized and denounced the ILWU as aforesaid. It further sets out that during the strike of sugar workers in 1946 Mr. Justice Rice, then circuit judge, issued "an ex parte injunction limiting picketing and other activities by the members of the ILWU in such strike"; that Jack Hall, a leader of the ILWU, issued a leaflet referring to Mr. Justice Rice as a "lawless judge" etc.; that 12 leaders of the aforesaid strike were indicted by the grand jury and charged with the felony of contempt for violation of the injunction issued by Mr. Justice Rice, and that affiant appeared before Mr. Justice Rice as attorney for these 12 strike leaders in 1946; that upon refusal of Mr. Justice Rice to continue the hearing on the validity of the proceedings until the supreme court had decided a similar case from Judge Wirtz, an action for injunction was filed against him in the United States District Court; that a preliminary injunction was issued against Judge Rice which was later dissolved and that thereafter the criminal contempt charges were reduced from felonies to misdemeanors. Affiant

further states that when Judge Rice's term was about to expire the ILWU opposed his renomination and reappointment; that affiant has frequently represented Jack Hall, the author of the pamphlet against Judge Rice, in litigation; that because of such activities and criticisms of him by Jack Hall, affiant believes that Mr. Justice Rice "is so embedded in conflict involving the antagonism of employer interest and working class interests" that he has a bent of mind against her and a personal bias and prejudice toward her which make it impossible for him to be impartial and to give assurance of impartiality in this proceeding. [333]

Certainly these activities of affiant and Jack Hall and the judicial proceedings and actions of Mr. Justice Rice could not by the widest stretch of imagination be construed to show any personal bias or prejudice on the part of Mr. Justice Rice toward affiant. They could at most show an impersonal prejudice resulting from the Judge's background, association or experience which is not sufficient within the meaning of the statute. (Eisler v. United States; Price v. Johnston; United States v. 16,000 Acres of Land, etc., supra.)

The affidavit setting forth the basis for Mr. Justice Stainback's bias and prejudice is defective in that it does not contain an allegation that the justice is personally biased or prejudiced against the movant. See cases cited supra. Although during the argument an offer was made to file a second

affidavit alleging such personal bias on the part of Mr. Justice Stainback, this would not be allowed even if the statute were applicable. Such offer is, therefore, refused. As to the legal sufficiency of the allegations, the affidavit attaches to it an excerpt from the testimony of Mr. Justice Stainback before a United States Senate Committee on January 8, 1954, and states that the excerpt was intended by Mr. Justice Stainback to refer to the affiant and the federal judge referred to was intended by Mr. Justice Stainback to be the Honorable Jon Wiig, Judge of the United States District Court for the District of Hawaii, and that the statement attributed to affiant referred to and described in the testimony was meant by Mr. Justice Stainback to refer to and describe the speech allegedly made by affiant at Honokaa, Hawaii, on or about December 14, 1952, and that in making the statement set out in exhibit A attached to the affidavit Mr. Justice Stainback meant to say that affiant in her Honokaa speech stated that Judge Wiig was not giving and would not give a fair trial in the matter then pending before him and that affiant made that statement as a part of an attempt by her and others to bring discredit upon all the courts of the Territory of Hawaii, including the United States District [334] Court.

The statement quoted was as follows:

"Senator Kuchel. * * * Again I wonder whether you suggest that circulation of that pam-

phlet in the courts of the territory should be used as another argument against Hawaiian statehood.

"Governor Stainback. I think it shows the extent to which the Communist people down there attempt to raise race prejudice and attempt to bring into disrepute the courts of the territory. The lawyer actually goes out and says, 'You cannot hope for justice before this Judge.' And that was a federal judge.

"The whole conduct was brought in to bring into contempt the courts and administration of justice. It is like Mr. Jack Hall's pamphlet which I referred to yesterday, when I removed him from police commissioner. I think the whole thing is part of an attempt to discredit the courts of the territory."

A pamphlet has just been referred to in my testimony—all of which testimony is contained in an exhibit admitted in evidence at the argument of the instant proceeding. This pamphlet was one circulated and sold in the Judiciary Building itself at the time of the hearing of the habeas corpus proceeding of the two Hawaiian boys who had been convicted of the murder of Mrs. Wilder. It was a reprint of a pamphlet entitled "The Navy and the Massie-Kahahawai Case" with a preface attempting to show that the convictions of Majors and Palakiko were the result of racial prejudice. As stated in my testimony, the lawyers (one being Mrs. Bouslog) said that they had nothing to do with the circulation of this pamphlet in the Judiciary Building.

This was a brief extract quoted by affiant from rather voluminous testimony by Mr. Justice Stainback at a hearing on Hawaiian statehood and was a continuation of his testimony showing the activities of the Communists in Hawaii in their [335] propaganda efforts, first against the then governor, and secondly against the courts of the Territory.

Prior to the reference to this pamphlet Senator Smathers had questioned the witness, Mr. Justice Stainback, at length regarding an article by Victor Riesel "Inside Labor" appearing in the "Daily Mirror" (a New York newspaper) in February, 1950, on the activities of the Communists in the Territory of Hawaii. Without giving in detail Mr. Riesel's article as it appears in the testimony upon statehood for Hawaii, suffice it to say the article stated, among other matters: "For several years Gov. Ingram M. Stainback has been one of the country's most sophisticated and intelligent opponents of Communist activities who were assigned to infiltrate Hawaii and the Democratic Party there by district 13 of the Communist Party, U.S.A., headquarters in San Francisco—as far back as 1937," and the article then calls the attention of the President to the activities of the Communists against the then governor because of his campaign against the Communist group; that though Philip Murray had removed the Communist members from the CIO, in Hawaii these Communists (the ILWU was at that time a member of the CIO) were making "an unusually effective smear campaign"

against the governor and that unless his column "can convince President Truman, when it crosses his desk, that he's about to get some very queer advice from Hawaiian 'Democrats'" the result of this "effective campaign" will be "to put on Truman's desk a recommendation that Governor Stainback not be reappointed next August. Instead, he's to be kicked upstairs into the Chief Justiceship of the Hawaiian Supreme Court—to replace the jurist who retires June 1." [336]

From the justice's testimony as a whole it would appear that the "prejudice" of the justice in question is directed against Communists and is not a "personal prejudice" against affiant who is casually mentioned as the lawyer for certain alleged Communists who were then on trial in federal court.

To summarize:

1. The provisions of section 9573 of the Revised Laws of Hawaii, 1945, relating to disqualification of judges because of bias or prejudice are not applicable to justices of the supreme court; however, a justice in addition to being disqualified by reason of relationship, pecuniary interest or previous judgment as set forth in section 84 of the Organic Act, may excuse himself from participating in a case where he feels that fairness and justice require such withdrawal.

2. The suggestions of disqualification of the justices for bias or prejudice were not timely made; in fact, not until after affiant had received an ad-

verse ruling on the sufficiency of the complaint did she make her affidavit of bias and prejudice against the two justices ruling against her. Would it be unreasonable or unfair to infer that these affidavits were made because she had tried the "pool of litigation" with her toe and found it too cool for a plunge as did the little boy testing the temperature of the water? (State v. Armijo, supra.)

3. The affidavit attempting to disqualify Mr. Justice Stainback is at least technically defective and that referring to Mr. Justice Rice is not only technically defective but does not in the remotest degree set forth any facts which would show such personal bias or prejudice against the affiant.

Therefore, for the reasons set forth above, we reject the affidavits upon which the suggestions of disqualification are based and hold that neither Mr. Justice Stainback nor Mr. Justice Rice is disqualified. [337]

While the writer of this opinion feels that he has no personal bias or prejudice against the affiant, and for the reasons set forth above that he is not technically disqualified, particularly because the suggestions of disqualification were not timely made (see cases supra), yet there are other matters to be considered.

While technicalities are frequently necessary to expedite proceedings and make an end to litigation, justice is not always furthered by standing on such technicalities and, where possible, such should

usually be waived where such can be done with fairness to all parties. "The letter killeth, but the spirit giveth life" is as true today as when first uttered.

A judge owes a duty not to withdraw from a case —however much his personal feelings may incline him to do so—where he is not legally disqualified, yet there may be circumstances that cast suspicion on the fairness of the judge proceeding in the case so that it may be advisable, for a judge not technically disqualified to withdraw sua sponte.

It might reasonably appear from that portion of my testimony given before the Senate Committee, as contained in the affidavit in support of the suggestion of my disqualification (which affidavit alone is to be considered) that I had adversely classified affiant and have prejudged her case.

It is not only important to render a righteous and correct judgment but that it be done in such a manner that it will beget no suspicion of the fairness and integrity of the judge. (30 Am. Jur., Judges, §35, p. 767.)

I agree with the statement of Mr. Justice Madden in United States v. Valenti, supra, who—after holding at great length that he had no personal bias and further that he was not legally disqualified in the proceeding—transferred the case [338] sua sponte with the statement: "And human nature being what it is, and being projected as it must through individual personalities, it is imperative that those entrusted with the awesome responsibility

of administering justice should, so far as is reasonably possible, insure the fullest measure of dispassionate consideration and impartiality, rather than chance even the slightest taint * * *."

I, therefore, shall take no part in the hearings of this matter upon its merits but respectfully suggest that a substitute be selected to serve in my stead.

Myer C. Symonds and John T. McTernan for Suggestions, for Harriet Bouslog, Respondent.

A. William Barlow for Bar Association.

Edward N. Sylva, Attorney General, and Morio Omori, Deputy Attorney General, for Territory.

tory. [339]

/s/ INGRAM M. STAINBACK,

/s/ PHILIP L. RICE.

Concurring Opinion of Rice, J.

I have joined in the opinion of the court as enunciated by Mr. Justice Stainback, as I concur in his therein stated principles of law and his therein summarization (1) as to the provisions of section 9573 of the Revised Laws of Hawaii, 1945, relating to disqualification of judges, not being applicable to a justice of the supreme court and that though additionally a justice having the relationship, pe-

cuniary interest or having rendered a previous judgment as specified therein would be disqualified under the provisions of section 84 of the Organic Act, if not so disqualified, he may nevertheless excuse himself from participating in a case where he feels that fairness and justice require his withdrawal; also, (2) that in the instant matter the suggestions of disqualification of the justices for bias or prejudice were not timely made; in fact, not until after affiant had received adverse ruling on the sufficiency of complaint did she make her affidavit of bias and prejudice against the two justices ruling against her; and further, (3) the affidavit attempting to disqualify Mr. Justice Stainback is at least technically defective and that referring to Mr. Justice Rice is not only technically defective but does not in the remotest degree set forth any facts which would show personal bias or prejudice against the affiant.

Therefore, I likewise concur in the ruling that, we reject the affidavits upon which the suggestions of disqualification are based and hold that neither Mr. Justice Stainback nor Mr. Justice Rice is disqualified. [340]

I believe that Mr. Justice Stainback has set forth adequate reasons for his voluntary withdrawal from participation in the hearing on the merits of the matter. However, I feel that there are not like reasons or any good reasons for voluntary withdrawal by myself, Justice Rice, and I feel that I can give the fullest measure of dispassionate consideration

and impartiality to the hearing on the merits and accord to the respondent Harriet Bouslog Sawyer, also known as Harriet Bouslog, the fullest, fairest and impartial hearing. Wherefore, I do not withdraw from the Bench for the hearing of her [341] case.

/s/ PHILIP L. RICE.

Dissenting Opinion of Towse, C. J.

I respectfully concur only in the principles of law enumerated in the majority opinion and in the voluntary act of withdrawal of Mr. Justice Ingram M. Stainback from participation in the hearing of this matter.

I am of the opinion, upon the entire record before us, the exhibits, the subject matter of the respective affidavits and the arguments of all counsel thereon:

First, that it is incumbent upon Mr. Justice Philip L. Rice as in the case of Mr. Justice Ingram M. Stainback, in order to avoid and dissolve any question whatsoever as to the propriety of Mr. Justice Philip L. Rice sitting as a member of the court upon the hearing of this cause; and

Second, that it is likewise incumbent upon Mr. Justice Philip L. Rice, as in the case of Mr. Justice Ingram M. Stainback, to the end that the fullest measure of dispassionate consideration and impartiality by this court may be insured upon said hear-

ing rather than chance even the slightest taint, however obscure, which would or could cast shadow or divert the fullest, fairest, and impartial hearing to which the respondent herein and any other respondent or litigant is entitled in accordance with the fundamental tenets and highest ideals of traditional concepts of fairness and justice.

That Mr. Justice Philip L. Rice should forthwith, as in the case of Mr. Justice Ingram M. Stainback, voluntarily recuse himself sua sponte for the compelling reasons that become apparent upon examination and consideration of said record.

/s/ EDWARD A. TOWSE.

[Endorsed]: Filed Jan. 19, 1956. [342]

In the Supreme Court of the Territory of Hawaii,
October Term 1955

No. 3044

In the Matter of:

HARRIET BOUSLOG SAWYER, Also Known as HARRIET BOUSLOG, an Attorney at Law.

Argued March 1, 1956.

Decided April 6, 1956.

Towse, C. J.; Rice, J.; and Circuit Judge McKinley in Place of Stainback, J.; disqualified.

Per Curiam. This is a matter instituted in this court by the Bar Association of Hawaii, an unin-

corporated association, by a complaint filed herein on July 8, 1954, under former and then in effect Rule 19 of the rules of this court. The complaint alleged as follows:

"I.

"That Harriet Bouslog Sawyer, hereinafter referred to as the Licensee, is and at all times hereinafter mentioned continuously has been an attorney at law duly licensed and admitted to practice before all of the courts of the Territory of Hawaii and before the United States District Court for the District of Hawaii, and that the said Licensee is now and during all of said times herein mentioned has been a practitioner before said courts.

"II.

"That the said Licensee, while appearing as counsel of record for certain defendants in that certain case in [443] the United States District Court for the District of Hawaii entitled 'United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et al., Defendants,' being Criminal Number 10495 in said court, during the course of the trial of said case, to wit, on or about December 14, 1952, did say during a speech to a public gathering in Honokaa, Hawaii, that horrible and shocking things were going on at said trial; that a fair trial was impossible; that all of the rules of evidence were being scrapped so the government could make its case; that the rules of evidence and procedure were made up as the case proceeded; and that unless the trial was

stopped in its tracks certain new crimes would be created.

"III.

"That said Licensee did during the course of said trial and shortly after rendition of a verdict therein visit a juror who was known by her to be indisposed, and thereafter submitted her affidavit concerning an interview with said juror to the presiding judge under circumstances indicating a failure to comply with standards of professional conduct required of practitioners of law licensed to practice before this Court." (See Bill of Particulars, infra.)

Pursuant to the prayer thereof and to the provisions of said Rule 19, the complaint, contained in this court's secret file number 45, was on July 8, 1954, referred to the committee on legal ethics and unauthorized practice of the supreme court of the Territory of Hawaii.

The said committee to which the matter was referred, [444] subsequently designated and hereinafter referred to as the legal ethics committee, or as the committee, on September 21, 1954, entered an order, requiring the Bar Association of Hawaii, as complainant in the matter, to either file a bill of particulars or amend paragraph "III" of its complaint of July 8, 1954, making more specific its charge therein set forth; and also requiring that on or before October 15, 1954, Harriet Bouslog Sawyer, also known as Harriet Bouslog, "file such special pleas as she wishes to present with respect to the

jurisdiction of the Committee and the sufficiency of the complaint and on or before October 15, 1954, file such information as she wishes to present to clarify her request that the hearing of this matter should be postponed until after disposition of the Fujimoto case, supporting such statement by copies of the briefs, excerpts therefrom, or such other information as she deems advisable, to show that the matter involved in the complaint filed in the above matter is the same as involved in the appeal of the Fujimoto case."

The Bar Association of Hawaii, by A. William Barlow, Esq., attorney, submitted a bill of particulars, dated the 29th day of September, 1954, which, excepting the title of court and cause, was and is as follows:

"Bill of Particulars

"Pursuant to an Order entered on September 21, 1954, by the Legal Ethics Committee, the following Bill of Particulars is hereby furnished:

"1. Copy of the affidavit of Harriet Bouslog, subscribed and sworn to before a notary public on the first day of July, 1953, signed by the Licensee Harriet Bouslog [445] and filed in the United States District Court for the District of Hawaii on July 1, 1953, in the case of United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto et al., Defendants, Criminal No. 10,495.

"'Affidavit of Harriet Bouslog

"'Territory of Hawaii,
"'City and County of Honolulu—ss.

"'I, Harriet Bouslog, being first duly sworn, on oath depose and say:

"'On Friday evening, June 26, 1953, shortly before 6:00 o'clock I received a telephone call at my home from Ellen Fuller Cabreros, sister of David P. Fuller who sat as a juror in the case of United States v. Fujimoto et al. Mrs. Cabreros asked me if I could come and see her brother; that he was seriously ill.

"'I went to the Fuller home at 1734 Colburn Street and was taken by Mrs. Cabreros and Mrs. Fuller into the front bedroom where Mr. Fuller was lying in bed. He appeared to be gravely ill.

"'I talked with his wife, Helen Fuller, in the living room of their home in the presence of Ellen Fuller Cabreros and her friend, Grace Oshiro, and two of the Fuller children. All members of the family present were upset and in tears at the state of Mr. Fuller. Mrs. Fuller stated that she had called a doctor to examine her husband and informed me that her husband had been ill since the return of the verdict, and particularly since early in the morning of Saturday, June 20, 1953, the morning after the verdict was returned.

"'Mrs. Fuller said that on Saturday morning, the day [446] immediately following the verdict of

guilty in the Smith Act case, at about five o'clock in the morning, she found her husband on his knees praying, begging God for mercy, saying he had sinned, that he had lied in the eyes of God; that Jack Hall was innocent and the case was a frameup; that Jack Hall is a good man; that those people are doing good for humanity and here someone is trying to block them. She said that in the time since, her husband had told her that the jury only looked at the Government's case and scarcely talked at all about the defendants' side and their case; that he asked her and the children to forgive him because he had done something wrong and it was too late; he said that one of the jurors said the defendants were innocent, and when the other jurors said, "Guilty, guilty," that juror threw a book across the room and said they just as well forget about it. Mrs. Fuller said that her husband had wanted to go see the judge and confess that he had lied, and once or twice tried to leave the house but was too upset mentally and physically and unable to leave the house by himself; that he fell and struck his head. She said that she and other members of her family urged him not to do anything, not to go to see the Judge and to forget about it, that he would only get himself in trouble and would get them in trouble, and that he might go to jail.

"Mrs. Fuller said that when he tried to leave and was unable to, she and other members of the family put him back in bed and tried to keep him quiet; that he kept shouting and crying and pray-

ing saying that the case was a frameup, that he had done wrong, and told the children and her to stay away from him because he was not clean. She said that [447] his condition seemed to get worse and worse as the days went by until on Friday, June 26, 1953, all day he was in bed and did not move or get up at all, and his voice became scarcely a whisper because he was hoarse from the shouting on previous days.

"'After the conversation with Mrs. Fuller, I went in the bedroom where Mr. Fuller was and asked him if he wished a drink of water. He nodded that he did. During this time, Mrs. Fuller, his sister and her friend were present in the room. Mr. Fuller struggled to talk and make himself heard but because of his weakened physical condition and the loss of his voice, it was difficult to understand what he said. He stated understandably, however, that he wanted help and wanted to get a clear conscience and get the wrong he had done straightened out.

"'Shortly after my arrival, a Doctor Chang arrived. I was not present in the bedroom during the conversation between Dr. Chang and Mrs. Fuller, although I could hear the conversation between Dr. Chang and Mrs. Fuller from the living room. After Dr. Chang had talked to Mrs. Fuller, Mrs. Fuller told me that the doctor said after examining her husband that there was nothing physically wrong with him, that he would have to rest in bed,

and that it might be necessary to take him to a hospital unless he would get up to go to the bathroom.

" 'After the doctor had left, in the presence of Mrs. Fuller, Mrs. Cabreros and her friend, Grace Oshiro, and Mrs. Fuller's eldest daughter, I gave Mr. Fuller water and he was propped up in bed. Again he tried to talk but seemed to find difficulty in doing so. He said he wanted [448] to talk about the matter and would talk to Jack Hall or anyone at any time to get a clear conscience.

" 'Shortly after this I left, believing Mr. Fuller needed rest. I made arrangements with Mrs. Fuller and Mr. Fuller to come to see him the next day with Jack Hall.

" 'On Saturday morning I was informed by Mrs. Cabreros that her brother was feeling considerably better and wanted to and would be able to see us.

" 'When Mr. Hall and I arrived at the Fuller home about 1:00 o'clock Saturday afternoon, June 27, Mr. Hall put out his hand to Mr. Fuller, Mr. Fuller looked at Mr. Hall for a long time and finally took his hand. Mr. Hall told Mr. Fuller he did not hold anything against him; that he just wanted Mr. Fuller to get well.

" 'Mr. Fuller said to Mr. Hall that from the talk of guilty by other jurors in the jury room, he believed he had to vote guilty to protect his brothers because he was afraid they would be fired if he did not. Mrs. Fuller said that both of Mr. Fuller's brothers, Leonare and Harry, worked for Isle-

Ways. Mr. Fuller said that it wasn't right that they only looked at Government exhibits and not at the defendants' exhibits or case. He said it was a frameup and said he blamed himself. He said that they looked at Government exhibits and any time someone suggested looking at defense exhibits some juror would say, "Later, later," and they never got around to it. He said that he knew and believed the defendants were innocent all the time but was afraid of what would happen if he voted not guilty.

" 'He said that the jury in their deliberations decided that the Communist Party was a conspiracy within the [449] first hour after they began their deliberations. He said that the instruction of the Judge which they used to decide this was the one which told them first to decide whether there was a conspiracy, and they decided the Communist Party was a conspiracy. He said he knew from what he heard the defendants were convicted before the case started on ideas the jurors had before the case started. He said he heard two jurors tell the Judge that they were opposed to Communism during the examination. He said that no secret ballots were taken, so everyone knew how each juror voted. He said some of the jurors said the Government wouldn't bring the charge if it wasn't true. He said that at some time he heard it said that if the defendants weren't convicted it would affect Hawaii's getting statehood. He said that the jurors on the side of the Government said that anybody who was

a member of the Communist Party must know what its purposes are and are guilty.

" 'He said that the jury wanted Kawano's testimony. He said the jurors on the defense side asked for Kawano's testimony to show that none of the defendants ever talked about overthrowing or destroying the government.

" 'He said that one juror said a number of times during the deliberations that he had to go to the Mainland and that they should get it over with.

" 'He said that if he voted for the defendants he was afraid the other jurors would tell about it and it would hurt his family. He said one of the jurors played cards in the jury room. He said that there was anger and shouting in the jury room between the persons who were for [450] the prosecution and those who were for the defense. Particularly the jurors for the prosecution got angry with the ones who were holding out.

" 'He said they didn't take any secret ballot, but anybody on the defendants' side had to speak up and then the others would try to get them to back down. He said that he heard jurors talk about Attorney Gladstein and said he was too smart and that he had defended the Communists in New York and had served a jail sentence. He said that he heard some of the jurors talk about the war against Communism. He said that they didn't consider the character evidence for the defendants.

" 'He said the second thing the jury decided was that all defendants were members of the Communist Party. The next thing they decided was that if they were Communists they must have intended to overthrow the government. He said that he himself did not believe Kawano and he heard others say they did not believe Muller. He said that after they asked for the instructions they used the one which told them to decide first whether there was a conspiracy, and right off they decided there was, and then talked about whether defendants were members of the Communist Party. He said there was a lot of talk about Bailey.

" 'After this conversation took place, when Jack Hall and I started to leave, Mr. Fuller begged Mr. Hall not to leave and raised his hands above his head and appeared to be praying although the words were not audible. Before leaving, Mr. Hall tried to quiet Mr. Fuller and helped Mrs. Fuller put her husband in bed. [451]

" 'Mr. Hall and I again went to see Mr. Fuller on Sunday, June 28, shortly after 1:00 o'clock in the afternoon. We were accompanied on this occasion by Joseph Kealalio. When we arrived, Mr. Fuller was sitting in a chair in the living room. He kept looking at Mr. Hall but did not speak.

" 'After conversing with Mrs. Fuller for a very short period of time, we came to the conclusion that it would be better to wait until Mr. Fuller was in better physical and mental condition.

"'When Mr. Hall started to leave, Mr. Fuller again pleaded with him not to leave.

"'Further affiant saith not.

"'/s/ HARRIET BOUSLOG.

"'Subscribed and sworn to before me this 1st day of July, 1953.

"'[Seal] /s/ J. D. MARQUES,

"'Notary Public, First Judicial Circuit, Territory of Hawaii.

"'My commission expires: July 15/53.'"

"The Complainant Bar Association neither affirms nor denies the truth or falsity of the allegations and facts contained in the affidavit filed by the Licensee Harriet Bouslog. The Complainant informs the committee that the above-recited affidavit, its contents, and the manner in which it was obtained furnishes the basis for the charge against the Licensee Harriet Bouslog and that the Complainant will introduce evidence in elaboration [452] of and in corroboration of the charge indicating a failure by the Licensee Harriet Bouslog to comply with standards of professional conduct required of practitioners before this Court and which unprofessional and unethical conduct is condemned in Opinion 109 issued March 10, 1934, by the Committee on Professional Ethics and Grievances by the American Bar Association and by Judge Prettyman in the case of Rakes vs. United States, 169 F. 2d at pages 745 and 746 and other related cases.

"Dated: Honolulu, T. H., this 29th day of September, 1954."

By letter dated October 14, 1954, addressed to the chairman of the legal ethics committee, J. Garner Anthony, then attorney for Harriet Bouslog, advised the committee as follows:

"This is to advise you that Mrs. Bouslog will present no special plea to the jurisdiction of the Committee nor does she propose to file any material or argument in support of her prior request for a continuance until the disposition of Fujimoto, et al., v. United States, No. 13,195.

"If the Committee believes it appropriate to hear this matter in advance of a determination of the Fujimoto case, we are ready to proceed. Our only request is that the matter be heard before the full Committee."

Thereafter proceedings were had before the said committee and the latter subsequently, to wit, on July 1, 1955, filed herein, under the aforesaid secret file number 45, its report, wherein the committee expressed an unanimous opinion that the Bar Association of Hawaii had sustained the allegations in paragraphs "I" and "III" of its complaint; that in her comments made at Honokaa (as alleged in paragraph "II" of [453] the complaint) the respondent licensee ("Mrs. Bouslog") imputed to the judge unfairness in the conduct of the trial (of the case of United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et als., Defendants,

Criminal 10,495, United States District Court for the District of Hawaii); impugned the integrity of the local Federal courts and made other comments and thus was guilty of violation of canons 1 and 22 of the canons of professional ethics of the American Bar Association and should be disciplined for the same; also, that there were * * * "differences of opinion within the Committee as to whether her interviews with juror Fuller were proper, as to whether they were in violation of Canon 23 of the Canons of Ethics and as to whether she should be disciplined, although the majority thinks she should be disciplined with respect to the charges in paragraph III" of the complaint.

Attached to and submitted with the report of the committee was a separate written statement by one member of the committee, wherein he expressed concurrence in the findings of the committee that the conduct of the respondent licensee was, with respect to the Honokaa speech and with respect to the matters concerning the juror, improper; and nonconcurrence in the conclusion of the other members of the committee with respect to the recommendations the committee should make to the court; and expressing his view that the then rule 19 of the rules of this court required that the committee, when recommending disciplinary action should go further and recommend "the nature of the discipline it feels is proper." He recommended that, "for the improper conduct of Mrs. Bouslog with reference to the Honokaa speech, she be suspended from the practice of law for such period of time as the

Court may deem just and proper"; and that [454] for her conduct regarding the juror which the committee had found improper "she be reprimanded."

Included with the report of the said committee and therewith returned secret file number 45 were: the complaint of the Bar Association of Hawaii against the licensee; the pleadings and memoranda which had been filed since the complaint, to wit, petitioner's (Bar Association of Hawaii's) exhibits 1, 2 and 6 and licensee's exhibits B, C, D, E, F and G introduced at the hearings before the committee, with the notation by the chairman of the committee that petitioner's exhibits 3, 4 and 5, copies of newspapers presented at the hearing before the committee on December 2, 1954, were subsequently withdrawn.

After consideration of the said committee's report, on July 8, 1955, this court issued to said licensee, Harriet Bouslog Sawyer, also known as Harriet Bouslog, an order to show cause, if existing, why the findings, conclusions and recommendations of the committee should not be adopted. Then, the matter was removed from the secret file as number 45 thereof and became number 3044 of the regular files of this court.

By order of court dated the 8th day of July, 1955, and filed herein on July 12, 1955, attorney A. William Barlow, member of the Bar of this court, was designated to, in conjunction with the attorney general of the Territory of Hawaii, pre-

sent the cause on behalf of the complainant, the Bar Association of Hawaii.

On July 27, 1955, by order of the Chief Justice of this court the licensee was granted an extension of time to September 19, 1955, within which to answer the order to show [455] cause theretofore issued. Subsequently, upon motions or requests on her behalf, further extensions of time were granted to the licensee to and including November 7, 1955, within which to file her return to the order to show cause and hearing on the latter was set for November 8, 1955.

On October 19, 1955, J. Garner Anthony, Esq., who had been of counsel for licensee at hearings before the committee and herein, filed a withdrawal as counsel, such bearing date of October 18, 1955.

On October 19, 1955, the licensee, therein referred to as "respondent"—"by way of return to the order to show cause issued on July 8, 1955"—moved to dismiss the order to show cause, upon several grounds therein set forth. Such motion was contested, a memorandum in opposition thereto having been filed on behalf of the complainant on October 26, 1955. To the latter a memorandum in opposition was filed on October 28, 1955. Argument on the motion and pertinent memoranda was heard, in open court, on November 3, 1955, before the Chief Justice and Justices Stainback and Rice. At the conclusion of the argument the motion was by the court denied, the Chief Justice dissenting in part and concurring in part.

The licensee (as respondent) was then granted to and including November 7, 1955, within which to file her return to the order to show cause and hearing thereon was set for November 8, 1955.

On November 4, 1955, conference was had between the justices and counsel upon a request that additional time be granted to the licensee to obtain mainland counsel to represent her. At the conclusion of such conference the return to the order to show cause was set forward to December 2, 1955, and [456] argument on the case set for January 9, 1956, at 9:00 a.m.

A motion for reconsideration was filed on November 7, 1955, by Myer C. Symonds, Esq., on behalf of the licensee. Such motion was argued on November 14, 1955, before this court, consisting of the Chief Justice and Justices Stainback and Rice.

On November 29, 1955, there was entered and filed an order denying the motion to dismiss the order to show cause, Chief Justice Edward A. Towse dissenting in part upon the ground that the charges premised upon the Fuller affidavit should be dismissed "as an interference with the administration of justice in the United States District Court for the District of Hawaii and a possible usurpation of the power thereof."

On December 2, 1955, there was filed on behalf of the licensee, by Myer C. Symonds, Esq., her attorney, a return to the order to show cause.

On December 7, 1955, there was filed, on behalf

of the licensee, a motion for continuance, together with a notice thereof, the motion being based upon an affidavit of John T. McTernan, Esq., and an affidavit of Harriet Bouslog, the licensee.

On December 12, 1955, argument was had on the said motion for continuance filed on December 7, 1955. The motion was denied and the court reiterated that the hearing on the order to show cause would stand as previously set for hearing on January 9, 1956, at 9:00 a.m.

On January 9, 1956, a pretrial conference was had in the chambers of the Chief Justice, he being present and also Justices Stainback and Rice, as the court, and Attorney General Edward N. Sylva, Deputy Attorney General Morio Omori, and A. William Barlow, Esq., on behalf of the complainant, and attorneys John T. McTernan and Myer C. Symonds, on behalf of the respondent [457] licensee. Subsequent to said first pretrial conference, to wit, on January 11, 1956, there were filed on behalf of the respondent licensee a suggestion of disqualification of Mr. Justice Stainback and also a suggestion of disqualification of Mr. Justice Rice, the two associate justices of this court. A memorandum in opposition to said suggestions of disqualification of the justices was filed on behalf of the Bar Association of Hawaii by the attorneys above named as appearing on its behalf at the pretrial conference on January 9, 1956.

Argument on the two suggestions of disqualification and the memorandum in opposition thereto was set for Janaury 12, 1956, but was continued to and heard on January 16, 1956, and at the conclusion thereof the subject matter was taken under advisement.

Subsequently—see opinion of the court by Stainback, J., concurring opinion of Rice, J., and dissenting opinion of Towse, C. J., filed together on January 19, 1956—the court rejected the affidavits upon which the suggestions for disqualification were based and held: "that neither Mr. Justice Stainback nor Mr. Justice Rice is disqualified," for reasons set forth and summarized as follows:

"1. The provisions of section 9573 of the Revised Laws of Hawaii 1945 relating to disqualification of judges because of bias or prejudice are not applicable to justices of the supreme court; however, a justice in addition to being disqualified by reason of relationship, pecuniary interest or previous judgment as set forth in section 84 of the Organic Act, may excuse himself from participating in a case where he feels that fairness and justice require such withdrawal." [458]

"2. The suggestions of disqualification of the justices for bias or prejudice were not timely made; in fact, not until after affiant had received an adverse ruling on the sufficiency of the complaint did she make her affidavit of bias and prejudice against the two justices ruling against her. Would it be unreasonable or unfair to infer that these affidavits

were made because she had tried the "pool of litigation" with her toe and found it too cool for a plunge, as did the little boy testing the temperature of the water? (State vs. Armijo, supra.)

"3. The affidavit attempting to disqualify Mr. Justice Stainback is at least technically defective and that referring to Mr. Justice Rice is not only technically defective but does not in the remotest degree set forth any facts which would show such personal bias or prejudice against the affiant."

However, because of a statement which he had previously made to a committee of the United States Senate (which he quoted in the aforesaid opinion of the court by him) Mr. Justice Stainback said: "I, therefore, shall take no part in the hearings of this matter [the proceedings herein against the respondent licensee] upon its merits but respectfully suggest that a substitute be selected to serve in my stead."

Mr. Justice Stainback having withdrawn, pursuant to the provisions of law, the remaining justices, the Chief Justice and Mr. Justice Rice, requested and authorized the Honorable Frank A. McKinley, fourth judge of the circuit court of the first circuit, Territory of Hawaii, to sit with them temporarily in place of Associate Justice Ingram M. Stainback, to hear and [459] determine this said cause, commencing on January 20, 1956.

Therefore, from and inclusive of January 20, 1956, and throughout the remainder of proceedings

herein, this court was comprised of Mr. Chief Justice Edward A. Towse, Mr. Justice Philip L. Rice, and Circuit Judge Frank A. McKinley, the latter substituting for Mr. Justice Stainback.

Before the court as comprised as last aforesaid, pretrial hearings, at which were present A. William Barlow, Esq., attorney for the Bar Association of Hawaii; Honorable Edward N. Sylva, Attorney General, Territory of Hawaii; and John T. McTernan, Esq., and Myer C. Symonds, Esq., attorneys for the respondent licensee, were held on January 20 and 23, 1956. Thereat it was determined that from the filing with this court of the report of its said legal ethics committee and the thereupon issuance of this court's order to the respondent licensee to show cause, if existing, the proceedings instituted by the Bar Association of Hawaii against the said respondent licensee had come before this court for trial de novo. Also that, in lieu of the taking anew of testimony and evidence in this proceeding before this court, the cause would, the respondent licensee consenting through her attorneys, be submitted upon the record which had been developed by and before the aforesaid committee and this court would file a pretrial order conformable to such determination.

On February 6, 1956, the pretrial order was entered and filed.

It was thereby ordered:

"1. The record upon which this matter is to be

submitted to the Court and determined by it is the following: [460]

"a. The Complaint of the Bar Association of Hawaii, dated July 8, 1954.

"b. The Bill of Particulars submitted by the Bar Association of Hawaii dated September 29, 1954.

"c. The Report of the Legal Ethics Committee to this Court dated June 9, 1955.

"d. The Order to Show Cause made and entered by this Court on July 8, 1955.

"e. The Return to the Order to Show Cause of Harriet Bouslog, respondent, dated December 2, 1955.

"f. The transcript of all proceedings before said Legal Ethics Committee, including the testimony adduced and the exhibits offered and received.

"g. And all motions, briefs and memoranda of law heretofore filed with this Court herein.

"2. The Court will consider the matter, as submitted on the record, disregarding those portions thereof not bearing on the charges set forth in the said Complaint.

"3. The parties hereto will file and exchange briefs on or before February 23, 1956.

"4. The Court will hear oral argument on Thursday, March 1, 1956, beginning at 9:00 o'clock a.m."

Pursuant to the pretrial order, supra, the entire record specified therein, with the transcript of oral testimony presented before and heard and the ex-

hibits admitted in evidence by the said legal ethics committee has and have been submitted to this court for scrutiny and evaluation; the parties filed and exchanged briefs on February 23, 1956, and oral argument was heard in open court on March 1, 1956. At the conclusion of the oral argument the matter was taken under advisement by this court. [461]

This court has scrutinized the record, the transcript of oral testimony and the exhibits aforesaid, read the briefs filed, examined the cases cited therein, and considered them with the oral arguments presented on March 1, 1956, and has since made its own evaluation thereof, inclusive and particularly of the evidence, and has drawn its own conclusions therefrom, unprejudiced by the report of the legal ethics committee, which made no comment on the relative credibility accorded by such committee to the witnesses, severally, or the weight given by the committee to the exhibits.

The court has noted in the record and particularly in the transcript of her testimony that the respondent licensee has exhibited an evasiveness and a lack of frankness as to her actions and sayings which were under investigation and inquiry. When confronted with testimony of witnesses who were of her audience at her speech in Honokaa, Hawaii, on or about December 14, 1952, and which testimony was to the effect that she had made the statements attributed to her in paragraph "II" of the complaint of the bar association, she did not categorically deny making such statements, but

equivocated by saying in effect that she had no recollection of making them and also that they were not indicative of language she would have used. However, she admitted authorship of the pamphlet, entitled "Fear," a copy of which was admitted in the proceedings before the legal ethics committee and is a part of the record, as exhibit 6 and comparison of the language used therein with the language attributed to her in her Honokaa speech reveals great similarity.

It is the finding and conclusion of this court that the allegations contained in the complaint of the Bar Association of Hawaii, more particularly paragraphs "I," "II," and "III" [462] thereof and the aforesaid bill of particulars pertinent to the last mentioned, have been sustained by convincing proof, by credible evidence of more than a mere preponderance; that the said respondent licensee, a member of the Bar of this court and an attorney at law, duly licensed and admitted to practice before all of the courts of the Territory of Hawaii and, also, before the United States District Court for the District of Hawaii, did, as charged in said paragraph II, being then an attorney of record for a defendant in a then pending case in the United States District Court for the District of Hawaii entitled "United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et al., Defendants," being criminal number 10,495 in said court, during the course of trial of said case, to wit, on or about December 14, 1952, say during a speech to a public gathering

in Honokaa, Hawaii, that horrible and shocking things were going on at said trial; that a fair trial was impossible; that all of the rules of evidence were being scrapped so the government could make its case; that the rules of evidence and procedure were made up as the case proceeded; and that unless the trial was stopped in its tracks certain new crimes would be created. Also, that, as charged in said paragraph III and the bill of particulars peritnent thereto, said licensee did—at the request of the juror's sister—shortly after rendition of a verdict in said case visit a juror and interrogated him, David P. Fuller, known to licensee as being indisposed, with respect to what may have transpired in the jury room, when the jury was therein for the purpose of considering the evidence and arriving at a verdict in the said case, which interviewing of the said juror was set forth in a subsequent affidavit by the said licensee, a copy [463] of which was and is incorporated in the aforesaid bill of particulars with respect to said paragraph III of the complaint of the bar association.

Upon its finding and conclusion as stated, supra, this court deems that in saying what she did in her speech to a public gathering at Honokaa, Hawaii, on December 14, 1952, as aforesaid, when there was then pending in the United States District Court for the District of Hawaii a case under the Smith Act, to wit, the case entitled "United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et als., Defendants," being criminal number 10,495

in said court, she engaged and participated in a wilful oral attack upon the administration of justice in and by the said United States District Court for the District of Hawaii and by direct statement and implication impugned the integrity of the judge presiding therein and in the said pending case, within the territorial boundaries of the Territory of Hawaii, and thus tended to also create disrespect for the courts of justice and judicial officers generally, contra to the obligations and duties assumed, as incident to the license, by her and by every person to whom a license has or shall have been issued by this court to practice in the courts of the Territory of Hawaii. She has thus committed what this court considers gross misconduct.

Wherefore, in the exercise of its inherent and statutory disciplinary power, this court orders that, for one year commencing from and next succeeding the entry of judgment herein, the said Harriet Bouslog Sawyer, also known as Harriet Bouslog, be suspended and prohibited from practice—either directly or indirectly and in any manner—in all and every one of the courts of the Territory of Hawaii, as an attorney at law, counsellor, [464] solicitor and proctor thereof; and that she also pay all costs and expenses incurred in, or incident to, the proceedings herein.

It is further ordered: that, the said Harriet Bouslog Sawyer, also known as Harriet Bouslog, forthwith surrender to a clerk of this court the

license heretofore issued by the court to her, dated December 23, 1941, and that said clerk thereupon place and retain such license, together with a certified copy hereof in an appropriately marked file of the court; also, that upon entry of judgment herein, an appropriate entry thereof be made in and upon the roll of attorneys licensed by this court to practice in all courts of the Territory of Hawaii.

It appears from the transcript which we have examined pursuant to the pretrial order herein, that her first visit to said David Fuller was made by the respondent licensee upon request by his sister. It also appears that it has not been uncommon, if not in fact common practice, heretofore and within the Territory of Hawaii, for attorneys as well as others to interrogate jurors, after rendition of verdict by them, as to what may have been decisive in reaching a verdict.

However, even if she relied upon the request of his sister when she first visited David Fuller, and upon a belief that it was common practice, locally, to interrogate trial jurors after verdict, such reliance thereon is not acceptable as excuse for her repeated visits to and studied interrogation of Fuller under the circumstances and as set forth in her affidavit, incorporated in the bill of particulars. In this connection, we quote from and adopt as a declaration of the view of this court, the following extract from the opinion of the court in Rakes vs. United States, 169 F. (2d) 739 (4th Cir. [465] 1948):

"We are impelled to add a further word upon this matter. The inviolability of the jury room from outside influence of any sort, actual or potential, is a prime necessity in the administration of justice. That unqualified rule requires that if a person, whether on the jury or not, knows of such outside influence, or an attempt at it, he must at once report his information to the court. The same rule requires that jurors are not to be harassed in any manner because of a verdict they have rendered. If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room. He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice. Much of such conversation and inquiry may be idle curiosity, and harmless, but a searching or pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned. It is incumbent upon the courts to protect jurors from it."

Let it be known that one acts at his peril: (1) who within the jurisdiction of the courts of the Territory of Hawaii hereafter, either directly or indirectly, without good cause shown to and express authorization of a court of record, or a judge thereof, interrogates one who has been, as well, as

one then being, a juror of a trial jury in any case, as to any occurrence in the room wherein and during the time when the trial [466] jury shall be, or have been, secluded therein for the purpose of conference or deliberation and an endeavor to reach a verdict; or (2) who shall after verdict interrogate one, who has been a juror of any said jury, as to what may have been persuasive in reaching the verdict, or upon what the jury based it.

However, in the instant matter, this court will let its hereinbefore expressed disciplinary order—suspending the said respondent licensee from the practice of law in the territorial courts for one year and requiring her to pay costs—suffice, although also deeming gross misconduct her said repeated interviews with and interrogations of David Fuller.

It has been indicated to this court that as the proceedings herein have been with respect to the conduct—which we have found to be gross misconduct—of the respondent licensee, the said Harriet Bouslog Sawyer, also known as Harriet Bouslog, in connection with or relation to a case in a Federal court, to wit, the case of the "United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et als. Defendants," criminal number 10.495, in the United States District Court for the District of Hawaii, this Supreme Court of the Territory of Hawaii should not have taken cognizance thereof and assumed and exercised jurisdiction in the instant matter.

We cannot accept that view of the situation. The respondent licensee is a member of the Bar of this and all other courts of the Territory of Hawaii, by virtue of a license issued to her by the Supreme Court of the Territory of Hawaii which license was by the express language thereof to be in effect "during good behavior." Therefore, the behavior of the respondent licensee as an attorney is ever a concern of the licensing court. See In re Isserman, 9 N. J. 269, 87 A. (2d) 903. [467]

Appended hereto and by reference incorporated herein and made a part hereof is a memorandum of other cases in re disciplinary proceedings against attorneys, which cases—as well as others—have had our consideration in connection with the instant matter.

Let judgment be entered pursuant hereto and in conformity herewith.

/s/ EDWARD A. TOWSE,

/s/ PHILIP L. RICE,

/s/ FRANK A. McKINLEY.

A. William Barlow (Also on the Briefs) for the Bar Association of Hawaii, Complainant.

Edward N. Sylva, Attorney General, and Morio Omori, Deputy Attorney General (Also on the Briefs) for the Territory.

John T. McTernan and Myer C. Symonds (Also on the Briefs) for Respondent-Licensee Harriet Bouslog Sawyer, Also Known as Harriet Bouslog. [468]

Concurring Opinion of Circuit Judge McKinley.

I concur with the majority in the finding of gross misconduct on the part of respondent, but would change the disciplinary action to that of disbarment.

/s/ FRANK A. McKINLEY. [469]

MEMORANDUM OF ACTION BY COURTS IN RE DISCIPLINARY PROCEEDINGS AGAINST ATTORNEYS

1. In re Isserman, 1952 N. J.
   (Disbarment.)
2. In re Ades, 1934 U.S. D. C., Md.
   (Reprimand.)
3. Bar Ass'n v. Philbrook, 1934 Cal.
   (Disbarment.)
4. In re Bevans, 1929 N. Y.
   (Suspension—1 year.)
5. In re Breen, 1908 Nev.
   (Disbarment.)
6. Bar Ass'n v. Metzen, 1919 Ill.
   (Disbarment.)
7. In re Chopak, 1946 U.S.D.C., N.Y.
   (Suspension—3 years.)
8. Cobb v. U. S., 9th Cir., 1909.
   (Suspension—18 months.)
9. Duke v. Comm. on Griev., 1936 D.C.
   (Disbarment.)
10. In re Dunn, 1909 Neb.
    (Indefinite suspension.)

11. In re Egan, 1909 S. D.
(Readmission denied.)
12. In re Graves, 1923 Cal.
(Suspension; period not mentioned in case.)
13. In re Hanna, 1924 N. M.
(Suspended by District Court; reprimanded.)
14. In re Hilton, 1916 Utah.
(Disbarment.)
15. In re Humphrey, 1917 Cal.
(Suspension—2 years.)
16. Johnson v. State, 1907 Ala.
(Disbarment.)
17. Ky. State Bar v. Lewis, 1955.
(Suspension—Six months.)
18. In re Knight, 1942 N. Y.
(Disbarment.)
19. Lewis Co. Bar Ass'n v. Willis 1917.
(Suspension—1 year.)
20. In re Mains, 1899 Mich.
(Disbarment.)
21. In re Meldrum, 1952 Iowa.
(Suspension—1 year.)
22. In re Mitgang, 1944 Ill.
(Censured.)
23. In re Palarine, 1945 Minn.
(Dismissed.)
24. Colo. Bar Ass'n v. Ginsburg, 1930.
(Suspension—1 year.)
25. In re Richeson, 1946 Ariz.
(Disbarment.)
26. In re Robinson, 1907 Wash.
(Suspension—Six months.)

27. In re Rogers, 1923 N. M.
(Suspension—Six months.)
28. In re Snow, 1904 Utah.
(Suspension—Two months.)
29. Snyder's Case, 1930 Pa.
(Suspension—1 year.)
30. State v. Brekenridge, 1927 Okla.
(Suspension—One month.)
31. In re Kirby, 1915 S. D.
(Dismissed.)
32. State v. Root, 1896 N. D.
(Dismissed because of irregularities.)
33. State Bar Comm. v. Sullivan.
(Disbarment.)
34. State Bd. of Law v. Hart, 1908.
(Suspension—Six months.)
35. State Bd. of Law v. Spriggs, 1945.
(Suspension—Six months.)
36. Neb. Bar Ass'n v. Price, 1944.
(Dismissed; lack of particulars.)
37. Ex parte Steineman, 1880 Pa.
(Reversed lower court.)
38. In re Troy, 1920 R. I.
(Suspension—2 years.)
39. U. S. v. Green, 1898 C.C.D. Colo.
(Disbarment.)
40. U. S. v. Markewich, 1919 S D.
(Censured.)
41. Wilhelm's Case, 1921 Pa.
(Disbarment.)
42. In re Wright, 1951 Nev.
(Suspension—Six months.)

43. In re Barenaba, 5 Haw. 279 (1885)
(Suspension—Three months.)
44. In re Paakiki, 8 Haw. 518 (1892)
(Suspension—2 years.)
45. In re Thompson, 15 Haw. 155 (1903)
(Suspension—1 year.)
46. In re Bevins, 26 Haw. 570 (1922)
(Suspension—Three months.)
47. In re French, 28 Haw. 47 (1924)
(Disbarment.)
48. In re Lyman, 30 Haw. 405 (1928)
(Disbarment.)

[Endorsed]: Filed April 6, 1956. [470]

In the Supreme Court for the Territory of Hawaii,
October Term, 1955

No. 3044

In the Matter of

HARRIET BOUSLOG SAWYER, Also Known as HARRIET BOUSLOG, an Attorney at Law.

JUDGMENT

This cause having been considered by this Court upon the entire record specified by the Pre-Trial Order entered on February 6, 1956, and the parties having filed their respective briefs on February 23, 1956, and having presented oral argument in open court on March 1, 1956, and upon the findings of fact and conclusions of law set forth in the Per Curiam Opinion filed in this Court on April 6, 1956,

It Is Ordered, Adjudged and Decreed:

1. That Harriet Bouslog Sawyer, also known as Harriet Bouslog, be suspended and prohibited from practice, either directly or indirectly and in any manner whatsoever, in all and every one of the courts of the Territory of Hawaii, as an attorney at law, counsellor, solicitor and proctor thereof, for a period of one year from the date hereof.

2. That Harriet Bouslog Sawyer, also known as Harriet Bouslog, forthwith surrender to a clerk of this court the license heretofore issued by the court to her, dated December 23, 1941, and that said clerk thereupon place and retain such license, together with a certified copy hereof, in an appropriately marked file of the court, and that an appropriate entry thereof be made in and upon the roll of attorneys licensed by this court to practice in all courts of the Territory of [472] Hawaii.

3. That Harriet Bouslog Sawyer, also known as Harriet Bouslog, pay all costs and expenses incurred in, or incident to, the proceedings herein.

Dated at Honolulu, T. H., this 7th day of April, 1956.

[Seal] /s/ EDWARD A. TOWSE,
Chief Justice,

/s/ PHILIP L. RICE,
Associate Justice,

/s/ FRANK A. McKINLEY,
Substitute Justice.

[Endorsed]: Filed April 7, 1956. [473]

[Title of Supreme Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Harriet Bouslog Sawyer, respondent above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the decision entered herein on the 6th day of April, 1956, and the judgment entered herein on the 7th day of April, 1956, suspending and prohibiting her from practicing as an attorney in all the courts of the Territory of Hawaii for a period of one year, directing her to surrender the license to practice issued to her by the Supreme Court of the Territory of Hawaii on December 23, 1941, and ordering her to pay all costs and expenses incurred in or incident to the proceedings against her.

Dated: Honolulu, Hawaii, this 13th day of April, 1956.

JOHN T. McTERNAN,
MYER C. SYMONDS,
By /s/ MYER C. SYMONDS,
Attorneys for Harriet Bouslog Sawyer.

[Endorsed]: Filed April 13, 1956. [485]

[Title of Supreme Court and Cause.]

STIPULATION AS TO DESIGNATION OF RECORD ON APPEAL

It Is Hereby Stipulated that the Clerk of the Supreme Court of the Territory of Hawaii, pursuant to Rules 8 and 10 of the Rules of the United States Court of Appeals for the Ninth Circuit, and Rules 73-76 of the Federal Rules of Civil Procedure, shall transmit to the Clerk of the Court of Appeals the following documents and instruments from the original records in the above-entitled proceeding:

1. Complaint Under Rule 19, filed July 8, 1954.

2. Letter dated July 8, 1954, from Chief Justice Edward A. Towse to C. Dudley Pratt, Chairman, Committee on Legal Ethics.

3. Copy of letter dated July 10, 1954, from C. Dudley Pratt, Chairman, Legal Ethics Committee, to Harriet Bouslog Sawyer.

4. Affidavit of John Young, dated July 13, 1954.

5. Copy of letter dated July 13, 1954, from Chief Justice Edward A. Towse to Mr. J. Edward Collins, Member, Committee on Legal Ethics.

6. Letter dated July 15, 1954, from Harriet Bouslog to C. Dudley Pratt, Chairman, Legal Ethics Committee.

7. Letter dated July 20, 1954, from Masaji Marumoto, President, Bar Association of Hawaii, to

C. Dudley Pratt, Chairman, Committee on Legal Ethics. [499]

8. Letter dated July 21, 1954, from Chief Justice Edward A. Towse to John E. Parks.

9. Order dated July 20, 1954, appointing John E. Parks as member of the Committee on Legal Ethics in place of J. Edward Collins.

10. Letter dated August 2, 1954, from Chief Justice Edward A. Towse to C. Dudley Pratt, Chairman, Committee on Legal Ethics.

11. Order dated August 2, 1954, vacating the order of July 20, 1955, and appointing Robert G. Dodge as a member of the Committee on Legal Ethics in place of J. Edward Collins.

12. Letter dated August 19, 1954, from Harriet Bouslog to C. Dudley Pratt, Chairman, Legal Ethics Committee.

13. Order dated September 21, 1954, by C. Dudley Pratt, Chairman, Legal Ethics Committee.

14. Letter dated September 27, 1954, from Masaji Marumoto, President, Bar Association of Hawaii, to Committee on Legal Ethics and Unauthorized Practice.

15. Bill of Particulars dated September 29, 1954, submitted by Bar Association of Hawaii.

16. Letter dated October 14, 1954, from J. Garner Anthony, Attorney for Harriet Bouslog, to C. Dudley Pratt, Chairman, Legal Ethics Committee.

17. Letter dated December 23, 1954, from (Mrs.) Leoti V. Krone, Deputy Clerk, Supreme Court, to C. Dudley Pratt, Chairman, Legal Ethics Committee.

18. Letter dated December 28, 1954, from (Mrs.) Leoti V. Krone, Deputy Clerk, Supreme Court, to C. Dudley Pratt, Chairman, Legal Ethics Committee.

19. Certificate dated November 23, 1954, by William F. Thompson, Jr., Clerk, U. S. District Court, District of Hawaii.

20. Letter dated February 25, 1955, from J. Garner Anthony to C. Dudley Pratt, Chairman, Legal Ethics Committee, transmitting Memorandum on Behalf of Harriet Bouslog.

21. Report of Legal Ethics Committee, filed July 1, 1955.

22. Transcript of Evidence before Legal Ethics Committee consisting of two volumes containing 429 pages of testimony taken on November 22, 23 and 24, and December 2, 3, 6 and 8, 1954, and Petitioner's Exhibits and Respondent's Exhibits. [500]

23. Order to Show Cause, filed July 8, 1955.

24. Officer's Return dated July 8, 1955, by David F. Harvey, Deputy High Sheriff, service on Harriet Bouslog.

25. Letter dated June 30, 1955, from C. Dudley Pratt, Chairman, Legal Ethics Committee to Honor-

able Justices of the Supreme Court of the Territory of Hawaii.

26. Order dated July 8, 1955, appointing A. William Barlow, in conjunction with the Attorney General of Hawaii, to present entitled cause on behalf of the Bar Association of Hawaii.

27. Order Extending Time to Answer, filed July 27, 1955.

28. Motion for Order Extending Time to File Return and Affidavit, filed September 17, 1955.

29. Withdrawal of Counsel (J. Garner Anthony), filed October 19, 1955.

30. Motion to Dismiss, filed October 19, 1955.

31. Order Extending Time to and including October 26, 1955, to file written statement of reasons by Attorney General of the Territory of Hawaii and the Bar Association of Hawaii, filed October 21, 1955.

32. Motion to Strike Memorandum in Opposition to Motion to Dismiss, filed October 28, 1955.

33. Minute Order, filed October 31, 1955.

34. Motion for Reconsideration, filed November 7, 1955.

35. Order Denying Motion to Dismiss the Order to Show Cause, filed November 29, 1955.

36. Order Denying Motion for Reconsideration, filed November 29, 1955.

37. Return to Order to Show Cause, filed December 2, 1955.

38. Motion for Continuance, Notice of Motion, Affidavit of John McTernan and Affidavit of Harriet Bouslog, filed December 7, 1955.

39. Request for Substitute Justice (Hewitt in place of Stainback), filed December 9, 1955.

40. Sugestion of Disqualification (Justice Stainback), and Affidavit of Harriet Bouslog, filed January 11, 1956. [501]

41. Suggestion of Disqualification of the Honorable Philip L. Rice, Associate Justice, and Affidavit of Harriet Bouslog, filed January 11, 1956.

42. Opinion of the Court upon Suggestions of Disqualification, filed January 19, 1956.

43. Request for Substitute Justice (Hon. Frank A. McKinley in place of Associate Justice Ingram M. Stainback), filed January 20, 1956.

44. Pre-Trial Order, filed February 6, 1956.

45. Opinion of the Court, filed April 6, 1956.

46. Judgment, filed April 7, 1956.

47. Request for Substitute Justice (Judge H. R. Hewitt), filed April 10, 1956.

48. Motion for Maintenance of Status Quo as to Business Affairs Pending Appeal to the United States Court of Appeals for the Ninth Circuit for a Stay of Suspension Pending Appeal, and Affidavit of Harriet Bouslog, filed April 10, 1956.

49. Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, filed April 13, 1956.

50. Supersedeas Bond, filed April 13, 1956.

51. Order Allowing Maintenance of Status Quo as to Business Affairs Pending Appeal to the United States Court of Appeals for the Ninth Circuit for a Stay of Supension Pending Appeal, filed April 13, 1956.

52. Order Extending Time for Maintenance of Status Quo as to Business Affairs, filed April 26, 1956.

53. This Stipulation.

Dated: Honolulu, Hawaii, this 17th day of May, 1956.

JOHN T. McTERNAN,

MYER C. SYMONDS,

By /s/ MYER C. SYMONDS,
Attorneys for Respondent.

/s/ EDWARD N. SYLVA,
Attorney General, Territory of Hawaii.

/s/ A. WILLIAM BARLOW,
Attorney for Bar Association of Hawaii.

[Endorsed]: Filed May 17, 1956. [502]

Supreme Court, Territory of Hawaii

No. 3044

In the Matter of:

A Complaint Against HARRIET BOUSLOG SAWYER, aka, HARRIET BOUSLOG. Hearing Before the Committee on Legal Ethics and Unauthorized Practice of the Supreme Court of the Territory of Hawaii.

TRANSCRIPT OF PROCEEDINGS

Morning and Afternoon Sessions, Nov. 22, 1954

Appearances:

C. DUDLEY PRATT, ESQ.,
Chairman;

MILTON CADES, ESQ.,
ROBERT G. DODGE, ESQ.,
CLIFTON H. TRACY, ESQ.,
EMIL C. PETERS, ESQ.,
S. TAKAHASHI, ESQ.,
Members of Committee;

MASAJI MARUMOTO, ESQ.,
President, Bar Assn.;

EVERETT U. AFOOK, ESQ.,
Investigator;

A. WILLIAM BARLOW, ESQ.,
Attorney for Bar Association;

J. GARNER ANTHONY, ESQ.,
Attorney for Mrs. Sawyer.

Whereupon, the following proceedings were had, and testimony taken: [1*]

Chairman Pratt: I would like the record to show that the Committee is all here with the exception of Heaton Wrenn, who is otherwise engaged. Is counsel ready?

Mr. Anthony: I appear for the respondent. We are ready. I would like to have the other appearances noted.

Mr. Barlow: I appear on behalf of our Association.

Mr. Marumoto: I appear with the members of the Committee, as president of the Bar Association.

Mr. Barlow: Mr. Afook is here. He is a special investigator for the Attorney General.

Mr. Anthony: Mr. Chairman, these proceedings are supposed to be confidential, unless the respondent otherwise requests, therefore we see no occasion for having anybody else but the members present.

Mr. Barlow: I might say, on behalf of our Association, we work through the Attorney General, and I understand that by law the Attorney General is charged with certain responsibilities in matters of this kind, and he asked Mr. Afook and the Bar Association to make an investigation, and there will be nothing that transpires here today on behalf of the Bar Association that Mr. Afook does not already know.

Mr. Anthony: I see no reason for having a stranger to the proceeding here, surely; it is supposed to be confidential. There are enough people

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

who know about this already, I was certainly not consulted before this move was made. The Attorney General is not here. If he were here that would be something else. The Bar has designated the persons who are to present the cause. [2]

Mr. Barlow: If the Committee should request Mr. Sylva's presence, we will make an effort to have him here.

Chairman Pratt: We hardly think that is necessary, Mr. Barlow, if you are going to present the case. Does this gentleman expect to testify in this matter?

Mr. Barlow: At the present time I doubt it very seriously, your Honor.

Mr. Anthony: That is not at all satisfactory to the respondent, Mr. Chairman.

Mr. Barlow: I will make the flat statement now that I will not put him on the stand.

Chairman Pratt: I think we will permit him to remain.

Mr. Anthony: What does the Committee do with that rule that the proceedings is to be confidential?

Chairman Pratt: The proceedings are confidential. This man was hired by the Attorney General, or engaged or nominated at least by the Attorney General to look into this matter, and get certain evidence, and they deem it advisable to have him here. I might say I just recently had a similar case——

Mr. Anthony: All I am pointing out is that you have already violated the rule when you have a stranger to the proceedings present.

Mr. Barlow: He is not a stranger to the proceedings. He was employed by the Attorney General's office, which is the office that is supposed to present these matters.

Mr. Anthony: Is that the judgment of the Committee, then, that he remain? [3]

Chairman Pratt: Is there any adverse opinion concerning his presence?

Mr. Cades: If he is needed to be present.

Chairman Pratt: Judge Peters, do you see any reason why the investigator cannot remain, or do you think he ought to leave?

Mr. Peters: According to the rules, this being confidential, I would like to see the rules enforced.

Mr. Anthony: May I read the rule, your Honor. I am reading from page 3 of the mimeograph sheet. "The hearing shall be closed unless the licensee or the person charged makes a written request prior to the commencement of the hearing that it be a public hearing. The licensee or person charged shall be entitled to be present at the hearing to cross-examine witnesses and submit evidence.

Mr. Peters: It seems to me on this wording, the fact the investigator is present does not seem to me to violate the rule relative to the meeting being closed.

Mr. Anthony: Here is a person whom I do not even know, or if he is a member of the Bar.

Mr. Peters: Who are you talking about?

Mr. Anthony: The investigator. I do not even know the gentleman.

Mr. Afook: I will advise you that I am not a

member of the Bar. I am purely an investigator connected with the Attorney General's office.

Chairman Pratt: Do you still continue your objection. Mr. Anthony? [4]

Mr. Anthony: Yes.

Chairman Pratt: On his statement that he is an investigator?

Mr. Anthony: Yes. The Attorney General is not presenting these proceedings.

Mr. Peters: Well, cannot the Attorney General be present?

Mr. Anthony: The Bar has seen fit to designate the president and executive committee.

Mr. Peters: Outside of that, should not the Attorney General be present?

Mr. Anthony: He is present by the investigator who worked out the evidence. It seems to me the respondent should be protected. I don't have anything further to say about it. My understanding is that these proceedings are to be confidential. Obviously if there are persons who are not members to the proceeding the confidentiality of the proceedings will not be preserved, and without any reflection whatsoever on this man that is present here.

(Discussion on procedure participated in by several members of the Committee.)

Mr. Anthony: The only real difference, I will point out, if the Committee please, the trial of a criminal case is constitutional, and it must be a public trial. This is not such a trial. This is an investigation into the conduct of a member of the

Bar. I will press the matter no further. Apparently the Committee feels that he should remain, and I do not.

Chairman Pratt: Let's proceed with the matter. [5]

Mr. Barlow: I am ready, your Honor, for the Bar Association.

(Further discussion as to the rules applying to the exclusion of certain persons from the room.)

Chairman Pratt: May we proceed.

Mr. Barlow: I would like to ask Mr. Anthony if he stipulates to certain matters; certain procedure. To your left is Harriet Bouslog Sawyer?

Mr. Anthony: So stipulated.

Mr. Barlow: And that she is the licensee named in the complaint, Number 45?

Mr. Anthony: That's right.

Mr. Barlow: And that she is licensed to practice in the Territory of Hawaii, and has been so licensed from whatever date it is?

Mr. Anthony: The Committee will take judicial notice of its own records.

Mr. Barlow: I would like to get a stipulation.

Chairman Pratt: I think it is sufficient for this proceeding that she is a member of the Bar. Is it material as to what date, Mr. Barlow?

Mr. Barlow: It is material to our proceeding, yes, sir. I would like to find out when she was admitted to practice.

Mrs. Bouslog: My recollection is December 11, 1941. It was in the year 1941, in December. Possibly I may be wrong.

Mr. Barlow: Will Mr. Anthony also stipulate that [6] the so-called "Hawaii-7" were indicted by the Federal Grand Jury on August 29, 1951; that there was a preliminary arraignment or some preliminary matter on August 31, 1951, and that on August 31, 1951, Bouslog and Symonds were present and were recorded as attorneys of record on August 31, 1951?

Mr. Anthony: I am ready to stipulate, and willing to stipulate whatever the contents of the record show, without admitting to any relevancy to this proceeding.

Mr. Barlow: If the record should show and indicate as I have outlined, will Mr. Anthony stipulate to it?

Mr. Anthony: I stated that I would.

Mr. Peters: Cannot we have a certified copy of the record?

Mr. Barlow: I think that these matters are all matters of court records.

Mr. Peters: Why don't you get certified copies and file them, and we all be furnished with copies of them, and then we do not have to enter into any stipulation, or get into any argument as to what occurred. This all may be perfectly clear to you, but it does not mean a thing to me. If I see a certified copy I know just exactly what occurred, and there is no question about it.

Mr. Barlow: If the Committee wishes I can get

a certified copy of the minutes of the proceedings of the Court for those three days.

Mr. Peters: That's right.

Mr. Barlow: I would like to call Mr. Matsuoka.

Mr. Anthony: I would suggest, before we call witnesses, [7] in order to expedite the proceeding, if you please, why wouldn't it be in order to file whatever documentary evidence there is, and have that before the Committee? These documents are referred to in the complaint. I told Mr. Barlow several weeks ago I would be perfectly willing to do that. One relates to the filing of an affidavit, and another relates to an incident that is recorded in the colloquy between Judge Wiig and the respondent. It seems to me that the expeditious way to conduct these proceedings is to file all those papers and the Committee then can determine what, if anything, by way of supplementary evidence should be taken.

Chairman Pratt: Any comments, Mr. Barlow?

Mr. Barlow: Well we have a December issue of the Hilo Tribune Herald we would like to present.

Chairman Pratt: What year?

Mr. Barlow: 1952.

Mr. Anthony: Mr. Barlow has not reached the problem I suggested. We will come to the testimony on hearsay newspaper articles later on, I am talking about the judicial record that has been filed in Court, and I am prepared to submit certified copies of the transcript of the proceedings and the affidavit.

Mr. Barlow: You are now?

Mr. Anthony: Yes.

Mr. Barlow: I have no objection. I have no objection to the affidavit that Mrs. Bouslog filed being given to the Committee now. [8]

Mr. Anthony: I don't know that I have enough, but I have quite a few; maybe not enough to go around.

I would like to file one affidavit in the case of United States of America vs. Charles Fujimoto—It is Criminal 10,495.

Mr. Peters: Are you filing that, Mr. Anthony?

Mr. Anthony: Yes. I am endeavoring to expedite the proceedings.

Mr. Peters: It seems to me that each side should present their evidence separately, but if Mr. Barlow then will accept your offer, then he can offer it, and be bound by it, and the materiality afterwards can be discussed.

Mr. Barlow: I have no objection to Mrs. Bouslog's affidavit being offered, but Mr. Anthony's offer also includes an affidavit of Ellen Cabreros.

Mr. Anthony: At this time I would like to confine my offer to her affidavit alone.

Mr. Peters: That's all right. You restrict your offer as much as you like. Let's get going here.

Mr. Anthony: If the record is going in, we want the whole thing in. There was a motion, and there were affidavits attached to this, and apparently Mr. Barlow wants to present the motion, and we want all the affidavits, and he wants one of the affidavits and not another of the affidavits, and I think that this Committee is all versed in——

Mr. Barlow: Mr. Barlow is not attempting to present any motion. It is connected to Mrs. Bouslog's affidavit and it has nothing whatsoever to do with the motion. [9]

Chairman Pratt: Let's proceed with the evidence. Apparently you cannot stipulate.

Mr. Barlow: It was one of the steps in the proceeding, but the proposal is merely concerned with Mrs. Bouslog's affidavit, and not the motion itself.

Chairman Pratt: At this stage are counsel willing to admit that the affidavit as set forth in the bill of particulars is a correct copy of Mrs. Bouslog's affidavit?

Mr. Anthony: Subject to check, we will admit that, Mr. Chairman.

Chairman Pratt: How about this transcript, Mr. Barlow? Is there any stipulation with respect to that. Do you want to offer that, or is that some of Mr. Anthony's evidence?

Mr. Barlow: I do not care to offer it on behalf of the Bar Association.

Chairman Pratt: Well, let's proceed with the evidence.

Mr. Anthony: May I ask the Committee what charge we are trying?

Mr. Barlow: First will be the first.

Chairman Pratt: The first is with respect to the speech, apparently; the speech at Honokaa.

Proceed.

YOSHIO MATSUOKA

called as a witness, and duly sworn, testified as follows:

Direct Examination

By Mr. Barlow:

Q. State your name?

A. Yoshio Matsuoka. [10]

Q. Mr. Matsuoka, on December 14, 1952, where were you employed?

A. By the Hilo Tribune-Herald.

Q. On that occasion did you have any particular assignment, to attend a meeting, at any time?

A. Yes, sir, I went to a public meeting sponsored by the ILWU at Honokaa, Hawaii.

Q. Now in what capacity did you go to the meeting? A. I went as a reporter.

Q. And who spoke at the meeting?

A. Well, there were several speakers. One was Mr. Jack Hall, and Mrs. Bouslog, and there were several other speakers who spoke in the Filipino language, and I think Samuel Bento, not a union man.

Q. Do you recognize Mrs. Bouslog being present today? A. Yes, over there. (Indicating.)

Q. Did you stay through her entire speech?

A. Yes, I did.

Q. Did you have occasion to make notes of that speech? A. Yes, I did.

Q. Did you have occasion to write a newspaper article about the speech?

A. Yes; that was my purpose of being there.

(Testimony of Yoshio Matsuoka.)

Q. I show you a copy of the Hilo Tribune-Herald, and ask you if you can identify the newspaper?

A. Yes, sir, this is it.

Q. I direct your attention specifically to the headlines, "Smith Act trials attacked again by Hall and Bouslog." Do [11] you recognize that?

A. I recognize the story. I did not write the heads.

Q. You recognize the story? A. Yes.

Q. Is that story your story?

A. Yes, that is my story.

Q. Now would you explain to the Committee just how that story developed; what the mechanics were in getting that story.

A. The mechanics were these: There was a meeting I think sometime during the week previous, and there was an announcement that there would be a meeting, the union could hold their own meeting in Honokaa, to which the public was invited, and there were speakers who would appear and tell about the Smith Act trial which was then under way in Honolulu, and the speakers included Mr. Hall and Mrs. Bouslog, and my editor told me: "You go and cover it," and it was a Sunday, and I drove down to Honokaa and went to this meeting, and sat down, sat there so as to take all the notes, and went back to Hilo, and I think I wrote it the next day, because that day was Sunday, and I don't think I wrote it the same day; I wrote it the next morning, and it appeared in the paper, just mechanically, just a news story.

(Testimony of Yoshio Matsuoka.)

Q. Have you read the article that has been referred to, in the December 15th issue?

A. Not right now, but when it came out I did. I usually read what I write. [12]

Q. Will you read that article and say whether what you wrote in that article actually transpired?

A. Right now?

Mr. Barlow: I think, with the Committee's indulgence, he should read the article.

Chairman Pratt: All right. Go ahead.

Mr. Anthony: Undoubtedly the witness has read it before in reference to the proceeding here. Cannot we get on with the case.

The Witness: I read it two years ago.

Mr. Anthony: Haven't you read it recently?

The Witness: No.

Mr. Peters: When you say "this meeting," Mr. Barlow, has there been any evidence put in as to when it was held, and the time it was held?

Mr. Barlow: We are coming to that.

The Witness: I have read it.

Q. Does that truly portray the sayings that took place at the meeting?

Mr. Anthony: I object to that statement; that calls for an opinion and conclusion.

Mr. Barlow: Could I finish my question before an objection is raised?

Chairman Pratt: Proceed with your question. Will you finish your question?

(Question, as above, read by reporter.)

(Testimony of Yoshio Matsuoka.)

Mr. Anthony: Now that is the end of the question.

Mr. Barlow: I would like to be heard on the question.

Chairman Pratt: Was it the end of the question? [13]

Mr. Barlow: Mr. Anthony is saying it was the end of the question.

Chairman Pratt: I am asking you. Proceed with asking the question.

Mr. Barlow: I will withdraw that question.

Q. To the best of your knowledge, Mr. Matsuoka, does that article truly portray the sayings that were uttered by the various speakers at that meeting, on that day?

Mr. Anthony: I object to that; it calls for a conclusion of the witness, and is leading and suggestive.

(Argument.)

Chairman Pratt: Any comments by the members of the Committee?

Mr. Peters: I think that the objection is well taken. I think that the procedure should be that the witness testify to what he heard; if he has not got a complete recollection, after he is through testifying, he can be asked if any notes that he has could refresh his memory, and to make it more complete he can also refer to that newspaper article, if he has not got any memory; that is the ordinary, regular way of proving the declarations of a third

(Testimony of Yoshio Matsuoka.)

party. Now it seems to me that the easy, regular way would be the proper way.

Chairman Pratt: Does the Committee concur with Judge Peter's comment? I think it is the concensus, I might state at this time, with the Committee's consent, I do not think it will stand on technical rules of evidence throughout, and we want to expedite matters, and we are not going [14] to stop you from asking leading questions and that sort of thing, but I think at this particular stage, perhaps, Mr. Barlow, of the evidence, this objection will be sustained.

Mr. Barlow: All right.

Q. Did you take notes on that occasion?

A. Yes, I did.

Q. Do you have those notes with you?

A. Yes, I do.

Q. Could you read those notes, to refresh your recollection?

Mr. Anthony: First, they should be produced and submitted, I believe.

Q. Do you have your notes with you?

A. Copies.

Mr. Anthony: Before the witness starts to read from the notes, the fundamental rule of evidence is to ask the witness, "Were you present," in a question of some kind, and if he says "yes," he should be asked, "What did Mrs. Bouslog say," and if he says, "I don't know," then he can have recourse to his notes, and if he says I remember what she said, let's hear what he remembers, and

(Testimony of Yoshio Matsuoka.)

not first come in with some typewritten document and start reading that.

Chairman Pratt: I think there should be some more groundwork, Mr. Barlow.

Mr. Barlow: All right.

Q. Will you state the date that this meeting was held, to your knowledge?

A. December 14, 1952. [15]

Q. Where? A. In Honokaa, Hawaii.

Q. Do you recall the building this meeting was held in?

A. In a theater called the People's Theater.

Q. Do you know approximately what time of the day that was?

A. It was in the morning hours.

Q. Do you mean in the early morning?

A. Late morning.

Q. Did you hear Mrs. Bouslog make a speech?

A. Yes, I did.

Q. Do you remember what Mrs. Bouslog said at that time?

A. Just the general drift. It was two years ago. I just know the story. I have written quite a few stories since then, and I just got the general idea, general circumstances, generally.

Q. Will you tell the Committee generally what you remember, to the best of your recollection?

A. Well, generally, she spoke about the trial, and the general idea was that the trial——

Q. Be more specific, as to what trial you are referring to.

A. The Smith Act trial; that was under way in Honolulu. She said she wanted to tell the people

(Testimony of Yoshio Matsuoka.)

about some of the shocking, horrible things that went on, and that the Smith Act trial could not be a fair one, and that they just had to go around and makes rules to fit the situation. That was, I think, the general trend.

Q. Now, do you remember everything that she said? [16] A. No, I do not.

Q. At the time that she made her speech did you make any notes? A. Yes, I did.

Q. Were the notes you made full and comprehensive?

A. Pretty full. I generally take full notes.

Q. Did you transcribe those notes?

A. Yes, I did.

Q. Do you have a copy of the notes that you transcribed? A. Yes, I do.

Q. Do you have them with you?

A. Yes, I have.

Q. Do those notes truly and accurately portray what Mrs. Bouslog said on that occasion?

A. So far as I am concerned, yes.

Q. You have already said that you do not remember everything that she said.

A. That's right.

Q. But the notes do contain everything, to the best of your knowledge? A. Yes, sir, almost.

Mr. Barlow: I would like to offer the notes into evidence.

Mr. Anthony: May I see the document?

Mr. Barlow: Yes.

Mr. Anthony: May I interrogate the witness on the document before the Committee rules on the admissibility?

(Testimony of Yoshio Matsuoka.)

Mr. Barlow: No objection. [17]

The Chairman: There is no objection.

Special Examination

By Mr. Anthony:

Q. Mr. Matsuoka, are these your original notes?

A. No, these are not the original. Those are transcribed.

Q. Where are your original notes?

A. That I don't know.

Q. When did you transcribe these?

A. Well, it was within a week from the incident, because it was right after——

Q. What was the date of the incident?

A. The 14th of December.

Q. December, 1952? A. Yes.

Q. And some time during the following week you made up these notes, is that right?

A. I did not make them up; I transcribed them.

Q. Transcribed them; that is what I mean. When did the Hilo Tribune go to press?

A. The next day.

Q. So that these notes were not the basis of what you wrote?

A. They are, yes. Let me explain. Those are the transcription of the original. In other words, the same thing slightly expanded. I wrote my story off the original notes.

Q. At the time, December 15, 1952, when the issue of the Hilo Herald Tribune was printed and published, you did not have this document in your office or in your possession, did you?

(Testimony of Yoshio Matsuoka.)

A. I don't think so. [18]

Q. At whose request did you make up this document?

A. I think at the request of my editor.

Q. That was after the story was published, is that right?

A. I could not say definitely, but I think so.

Q. It must have been, isn't that true?

A. Yes, it probably was.

Mr. Anthony: We object to this on the ground that it is not the contemporaneous notes made by the witness at the time.

Chairman Pratt: Mr. Barlow, any comments?

Mr. Barlow: Yes. I think the law is well defined that notes do not have to be contemporaneous with the speech. He can hear a speech today and make a report on something tomorrow or the next week, as to whatever the best recollection is he has of it, and I think that they are admissible in evidence, and the Committee can give them the value, whatever the Committee feels they are worth. He indicated in his testimony that they are made from the original notes, longhand or shorthand, I don't know which, but he made longhand or shorthand notes and then upon request he transcribed them, and these are the transcribed notes, and he says that they are transcribed from the handwritten notes that he made, so the handwritten notes, I assume, and the testimony indicates, were made contemporaneous with Mrs. Bouslog's speech.

Q. (By Mr. Anthony): And you have destroyed the handwritten notes?

(Testimony of Yoshio Matsuoka.)

A. No, I did not destroy them.

Q. What did you do with them?

A. I think I gave them to these people who came here; who [19] came to see me about it.

Q. Who was that?

A. Representatives from the——

Q. The F. B. I.?

A. I think so. The U. S. Attorney.

Q. Did you give them to Mr. Barlow?

A. No. In fact, I had never met him.

Chairman Pratt: Any further questions by members of the Committee?

Examination

By Mr. Peters:

Q. Was this the regular routine that you followed? Do you come in with your handwritten notes, and on the occasion with relation to which you are getting up copy do you go to work and write up your story for the paper and hand that in to the mechanical end of the paper and then you write up these notes later; is that the routine?

A. No, it is not.

Q. This is a special routine that you followed in this particular case? A. At a request.

Q. And these notes, these original notes, in due course, were handed over to the F. B. I. What is the F. B. I.? A. What is the F. B. I.?

Q. Yes.

A. Two gentlemen from the Federal Bureau of Investigation.

(Testimony of Yoshio Matsuoka.)

Q. As far as you know, then, it is in their custody at the present time, these notes?

A. I don't know if it is in their custody, but I am pretty sure I gave it to them. [20]

Q. Did you give it to them before or after you made this? (Indicating.) A. After.

Mr. Peters: I think that these notes are admissible.

Examination

By Mr. Dodge:

Q. You stated that the transcription of these notes were somewhat expanded from your original notes? A. Yes.

Q. Would that also be true of the newspaper article?

A. When I say expanded, I mean, like, when I take notes, I would not say, "Robert Dodge yesterday," I would say, "Dodge," or something like that, and expand that to make it understandable to the reader.

Q. By expanding, not adding to it?

A. No, not adding to.

Q. Or an addition, or anything of that kind, but filling out what your notes indicated, is that it?

A. That's right, by expanding on it.

Mr. Anthony: That is all the more reason we should have the original notes.

Mr. Barlow: If you can get them. I don't think it is incumbent upon us to produce the original notes, if we have explained the reason for it not being here.

Chairman Pratt: Any objection to the receipt?

(Testimony of Yoshio Matsuoka.)

It will be received and marked Petitioner's Exhibit 1.

Direct Examination
(Continued)

By Mr. Barlow:

Q. Now, Mr. Matsuoka, after you had returned, you had to write a newspaper story based upon the notes that you transcribed, is that right? [21]

A. That's right.

Q. Would you look at that December 15th, 1952, issue of the Hilo Tribune and indicate to the Committee whether that is the newspaper story based upon the notes which you made during the speech by Mrs. Bouslog? A. Yes, this is it.

Q. That is the story? A. The story.

Q. It is your story? A. Yes.

Q. Based on the happenings in fact that took place at that meeting, is that right?

A. That's right.

Mr. Barlow: I offer the newspaper in evidence.

Chairman Pratt: Any comments, Mr. Anthony?

Mr. Barlow: I offer only that portion of the article that pertains to Mrs. Bouslog; there are other people named.

Chairman Pratt: This is an offer of the newspaper. Is there any objection to the receipt of the newspaper, by the Committee?

It will be received as Exhibit 2.

Mr. Anthony: Might I ask if Mr. Barlow has attempted to get the original notes that were taken?

Mr. Barlow: I might say that, as Mr. Anthony

(Testimony of Yoshio Matsuoka.)

knows, is an impossibility; it is sacred; you cannot obtain anything through the F. B. I.

Mr. Anthony: I am not at all sure about that. Here is a piece of property in the possession of the F. B. I. which belongs to the witness on the stand. Do you mean to tell me [22] any court in the land would tell the F. B. I. they could keep a man's property, if there is an honest attempt made to get it back?

Mr. Barlow: There has been an honest attempt to get it back. I spoke to several of those gentlemen and there have been all kinds of telephone calls to Washington, without any positive results.

Mr. Anthony: The rules of this Committee permit the issuance of subpoenaes, and this Committee can issue a subpoena right now to the gentlemen in charge, who have the document in their possession, and tell him to bring it up here.

Chairman Pratt: Well, the Committee will take that matter under advisement. Could we proceed?

Mr. Barlow: The Bar Association has no further questions.

Cross-Examination

By Mr. Anthony:

Q. What newspaper are you working for now?

A. I am not working for any newspaper.

Q. Where are you working?

A. I am working for the Hawaiian Sugar Planters' Association.

Q. And what is your position there?

A. I am in the Public Relations Department.

(Testimony of Yoshio Matsuoka.)

Q. When did you write your story, Mr. Matsuoka?

A. In 1952. Do you mean the story you are referring to?

Q. Yes.

A. I think I did it the next morning, because the day the incident occurred was a Sunday. [23]

Q. Sunday, December the 14th, is that right?

A. Yes.

Q. 1952? A. Yes.

Q. And what time do you go to press?

A. I think in those days we went to press about 11:00 in the morning.

Q. So you wrote this story some time between 9:00 and 11:00, is that right?

A. No; earlier, probably a little after 8:00.

Q. Have you ever, in your experience as a newspaperman, at any time other than this occasion, gone through the procedure that you have done here, namely, preserved a copy of notes of a newspaper story? A. The original ones?

Q. Yes.

A. Well, it is my habit; I used to have a desk and everything that I wrote, in my notes, I used to keep them there and stock them up for awhile, so if any question comes up, I had them.

Q. And when they get old you throw them away? A. No set period.

Q. But you never type up those notes?

A. No.

Q. Who is the person that you gave your notes to? A. Which notes?

(Testimony of Yoshio Matsuoka.)

Q. The notes upon which this story was based?

A. The original notes?

Q. Yes. [24]

A. As I said before, I think it was those two F.B.I. people.

Q. When was that?

A. Within a week; in the week following.

Q. A week following December 15th, 1952?

A. Yes.

Q. And where did you give them to them?

A. In the office; in the Tribune-Herald office.

Q. Have you ever asked for them back?

A. No, I have not.

Q. You have never made any attempt to get your notes back?

A. No. My job was finished then.

Q. You have said that you were requested by your editor to type up those notes? A. Yes.

Q. Who was the editor?

A. Harry Blockhahn.

Q. When did he request that?

A. Oh, I could not give you the exact, you know, time, but sometime after this thing came up.

Q. Before or after the F.B.I. got your original notes? A. I think it was before.

Q. Did he give any reason for requesting you to adopt the procedure of typing up the notes, when he already had your story in the paper? Did he assign any reason for that?

A. Not that I recall, but I think the general idea then was, the story appeared in our paper and also

(Testimony of Yoshio Matsuoka.)

in a Honolulu paper affiliated with us, and there was some to-do about it in court, and I think as a result of that, I think—I think that was it. [25]

Q. This meeting in which Mrs. Bouslog attended, that was a meeting of union men, was it, or the public, generally?

A. It was not a union; it was a union sponsored meeting, for the public.

Q. Anybody in the public could attend?

A. Yes.

Q. Was the meeting perfectly orderly?

A. Yes.

Q. Nobody started throwing any rocks around?

A. No.

Q. Or got excited?

A. No; very good meeting.

Q. Nobody got up and interrupted the speaker, or had any great to-do about what was being said?

A. No.

Q. How long did the thing last?

A. Well, let's see; I think it lasted about two hours; an hour and one-half, or two hours.

Q. Now Honokaa is a plantation village, is it not? A. Yes.

Q. There are a lot of sugar workers around there? A. Yes.

Q. And I have forgotten, but you told us where the meeting was held. Where was it?

A. The People's Theater.

Q. Is that a moving picture theater?

(Testimony of Yoshio Matsuoka.)

A. I think so, yes; I am not sure, but I believe it is.

Q. And when the meeting was all over everybody got up and peacefully left the meeting, is that right? [26]

A. Yes.

Q. And as far as you were concerned there wasn't any disturbance there at that meeting?

A. No.

Q. Mr. Matsuoka, your recollection is, is it not, what Mrs. Bouslog was talking about was not only the case pending here, but all Smith Act trials; isn't that a fair statement?

A. Well, I think she was dwelling specifically on the local Smith Act trial, but she might have been referring to others.

Q. You know she did, because she did speak of others, and she went back as far as 1949?

A. Yes.

Q. It was a general criticism as to the character of the criminal proceedings brought under the Smith Act, isn't that a fair statement?

A. Yes, a portion of that speech, I think.

Redirect Examination

By Mr. Barlow:

Q. When did you start working for the H.S.P.A.?

A. July 26th of this year, and I would like you to know that I have no axe to grind.

(Testimony of Yoshio Matsuoka.)

Mr. Anthony: We don't think so. Don't worry about that.

Chairman Pratt: Do the Committee have any questions?

You are excused.

(Witness excused.) [27]

GILBERT FERREIRA

called as a witness, and being duly sworn, testified as follows:

Chairman Pratt: What is your name?

The Witness: Gilbert Ferreira.

Direct Examination

By Mr. Barlow:

Q. Where are you presently employed?

A. Honokaa Sugar Company.

Q. On December 14, 1952, where were you employed? A. Yes.

Q. Where?

A. Oh, for the same Honokaa Sugar Company.

Q. On December 14, 1952, did you have occasion to go to the People's Theater in Honokaa?

A. Yes, sir, I did.

Q. Do you remember whether Mrs. Bouslog was there? A. Yes.

Q. Do you know Mrs. Bouslog?

A. Yes, I do.

Q. Do you recognize her here? A. Yes.

Q. Will you identify her? A. Yes.

(Testimony of Gilbert Ferreira.)

Q. Do you remember whether Mrs. Bouslog made a speech on that day?

A. Yes, I remember.

Q. Just tell the Committee to the best of your recollection what Mrs. Bouslog said.

A. She started off telling us about the Smith Act trial; [28] that there was no fair trial in the Smith Act case; that the government—I mean, they made up their rules as they went along in Smith Act trial, and she compared the Majors-Palakiko case with the Smith Act trial, and she also stated that in the Smith Act trial they tried you on a conspiracy, and "conspiracy" was explained to us, not the exact wording, but was something that they tried you for, for your thoughts; in other words, something that some people think, or you might think of, or this person might think of doing some day, but never actually did, but that is how she explained it on this conspiracy.

Q. When she was talking about the Smith Act trial, did she talk about any particular Smith Act trial?

A. I don't recall, but I think so; there was something to say about Jack Hall, but I don't recall whether it was connected with the Smith Act trial or not; something said about him.

Q. When she talked about the Smith Act trial did she talk about the Smith Act trial in which——

Mr. Anthony: I object to these leading and suggestive questions here.

Chairman Pratt: Sustained.

(Testimony of Gilbert Ferreira.)

Q. Did she mention any particular locality when she was talking about the Smith Act trial?

A. If I remember right it was in Honolulu, but I am not too sure about that; I think it was down here.

Mr. Barlow: No further questions.

Mr. Anthony: No questions.

(Witness excused.) [29]

JOHN D. MORSE

called as a witness, being duly sworn, testified as follows:

Chairman Pratt: Please state your name.

The Witness: John D. Morse.

Direct Examination

By Mr. Barlow:

Q. How old are you, Mr. Morse?

A. Fifty-one.

Q. Where were you born?

A. San Francisco.

Q. What is your occupation?

A. Industrial Relations Director of Honokaa Sugar Company.

Q. On the 14th of December, 1952, what was your occupation? A. Same occupation.

Q. On December 14, 1952, did you have occasion to be at a meeting in Honokaa? A. I did.

Q. Do you recall whether Mrs. Bouslog was present? A. She was present, yes.

(Testimony of John D. Morse.)

Q. Do you know Mrs. Bouslog?

A. I do not know her personally, no.

Q. Do you recognize her in court?

A. Yes. I have seen Mrs. Bouslog on several occasions.

Q. Now do you know whether Mrs. Bouslog made a speech on that day, or not?

A. She did.

Q. Will you tell us what time of the day it was; morning, noon, or night?

A. It was in the morning.

Q. The late or early morning? [30]

A. Oh, I would say around ten or eleven o'clock; somewhere in there.

Q. Do you recall what Mrs. Bouslog said at that meeting?

A. Yes, I recall a few things. I did hear her say that there is no such thing as a fair trial in a Smith Act case, and she said that. Well, she talked quite a bit about Jack Hall, Mr. Hall was there; about the trial that was going on at that time.

Q. Did she in anywise talk about the rules of evidence in the Smith Act trial?

A. Yes. I don't remember word for word, naturally, but she did say that in a Smith Act case that the government permitted evidence that was primarily in their favor—in favor of the government.

Q. Did she refer to the conduct or the manner in which the Honolulu Smith Act trial was conducted?

Mr. Anthony: I object to this continual leading. Cannot we have what the woman said, rather than

(Testimony of John D. Morse.)

suggestions of the prosecutor as to what she said or did.

Chairman Pratt: Well, will you reframe your question?

Q. Search your memory, Mr. Morse, and try to tell the Committee everything that Mrs. Bouslog said.

A. Well, she referred quite often to the trial in Honolulu, and about the difference—about the evidence that was brought up against the seven persons who are on trial, and how trying it was; that it had been going on for days, and that is about all I can recall.

Q. Now did you have occasion to read the articles in the Hilo Herald-Tribune of December the 15th, 1952? [31] A. I did.

Q. Would you read that article to yourself, and see if that correctly portrays the happenings, to your recollection? (Handing document to witness.)

Mr. Anthony: Mr. Chairman, I think before he reads that, I think rather than have the witness read the newspaper article and then answer the question. we ought to have something more now. The gentleman has told us what he recollects. Now what we are doing is compounding hearsay here, by having him read this newspaper article, and then presumably the witness will be asked for his opinion of the newspaper article instead of for his personal knowledge, of what the witness heard or saw.

(Discussion between members of the Committee, and argument by counsel.)

(Testimony of John D. Morse.)

Chairman Pratt: I think at one stage, when you started to question him, it seems to me at that stage it was up to you to lay a little more foundation as to what he was about to say. You could ask the witness concerning a statement which you think may have been said at that time.

Mr. Peters: Mr. Anthony is saying the correct thing; on the basis of exhausting the recollection of the witness.

Q. Mr. Morse, do you remember Mrs. Bouslog making any statement as to whether there was such a thing or not as a fair trial in the Smith Act case?

A. I remember her saying there was not such a thing as a fair trial in a Smith Act case.

Q. And do you remember whether she referred to the conduct [32] and manner in which it was being handled?

A. Well, it tied in, I figured it, tied in with any Smith Act case, whether in Honolulu, New York, or whatever it was; that is the impression I got from what she said.

Q. Did she mention a person by the name of Henry Johnson? A. She did.

Q. Did she mention a person by the name of Jack Hall? A. She did.

Q. Did she mention a person by the name of Paul Crouch? A. I don't recall.

A. Did she say anything about the F.B.I.?

A. Yes, she mentioned the F.B.I.

Q. Do you recall what she said about the F.B.I.?

(Testimony of John D. Morse.)

A. Not exactly. She mentioned the F.B.I., that they should spend more time doing something—I cannot recall what it was now; they were not exercising all their efforts in the right direction; that is what I recall.

Mr. Barlow: No further questions.

Mr. Anthony: May I have a copy of the report you are examining there?

Mr. Barlow: Not unless the Committee say that I should.

Mr. Anthony: Here is a member of the Bar that is on trial. It seems to me we ought to have the right to have the documents that you have.

Mrs. Bouslog: I would be happy to have you read all the statements that were submitted in evidence, with your approval. You could eliminate all these witnesses.

Mr. Anthony: I am making a request; apparently Mr. Barlow has got a document in regard to the statements of [33] this witness. There is nothing unfair about that. I am sure we all want to be fair.

Mr. Peters: Do I understand, or am I correct in assuming, that these are your own private notes?

Mr. Anthony: No, those are F.B.I. notes.

Mr. Barlow: Those are counsel's notes. If the witness has notes, I think Mr. Anthony would be entitled to see them. If the Committee wants him to have them, I will get them for him. I am entitled to this document.

Mr. Anthony: I think we are entitled to them.

(Testimony of John D. Morse.)

However, if he doesn't want to give it to me, that's all right.

Cross-Examination

By Mr. Anthony:

Q. This was a perfectly orderly meeting, was it not? A. Yes, it was.

Q. There was no brawl or row there, so far as you know?

A. No, I could not say under oath that there was.

Q. Was there?

A. I don't know who the gentleman was, a Filipino, who got mad and walked out.

Q. But as far as rows or—— A. Oh, no.

Q. It was perfectly in order? A. It was.

Examination

By Mr. Peters:

Q. I was just wondering how many, besides the witness, who were there, understood the English language?

Mr. Anthony: Were most of these fellows Filipinos over there, Mr. Morse?

A. Well—— [34]

Q. (By Mr. Anthony): Plantation workers?

A. Yes, they were practically all plantation workers; there were a few outsiders, but made up with Filipinos, Japanese, about 200, maybe 150, Portuguese.

nony of John D. Morse.)
How many people were there all told, around would you say?
I would say between 250 and 275, or it might it 300; there was quite a lot.
Did most of them speak the English lan- would you say?
Now, if I remember right they did have a ıere in Filipino. I think it was a lady or a there.

Redirect Examination

. Barlow:

Did you understand what Mrs. Bouslog said?
I did.
And were there any other people there who tood the English language as well as you do?
Oh, yes, a lot of them could understand the h language; all the Japanese could.
How many would you say in the crowd of ıderstood what Mrs. Bouslog was talking
A. I would say 200.

(Witness excused.)

MRS. THELMA OLIVAL

called as a witness, being duly sworn, testified as follows:

Chairman Pratt: Please state your name.

The Witness: Mrs. Thelma Olival.

Direct Examination

By Mr. Barlow:

Q. Mrs. Olival, do you speak the English language? [35]

A. Yes.

Q. Do you understand the English language?

A. Yes.

Q. On December 14, 1952, did you have occasion to attend a public hearing in Honokaa?

A. Yes.

Q. Do you remember whether or not Mrs. Bouslog was there? A. Yes, she was.

Q. Do you remember whether or not Mrs. Bouslog made a speech? A. Yes, she did.

Q. Do you know what Mrs. Bouslog said in that talk? A. Yes.

Q. Would you please relate it, and instead of going up and down with your head, as the reporter has to take it down. Please tell the Committee what Mrs. Bouslog said on that occasion, if you remember.

A. Yes, I am just trying to collect my wits. She said that the trial was against Jack Hall, and six others were just brought in, and that its purpose was to get at the ILWU; she said that Jack Hall

(Testimony of Mrs. Thelma Olival.)

was being tried on something that he read many years ago, and she said that in the Smith Act trial there were no rules, and that they were making up the rules as they went along, and she said that the F.B.I. could be called Federal cops, and that when the government—they were stressing this case, and when the government—that witnesses were afraid to testify, and they testified usually what the government wanted them to testify.

Mr. Peters: They testified what?

The Witness: Usually what the government wanted them to testify. [36]

Q. Mrs. Olival, did Mrs. Bouslog use a phrase indicating that there were rather shocking and horrible things that were going on at the trial?

A. Yes, she used those.

Q. Now what trial was she referring to?

A. To the Jack Hall trial.

Q. Do you know where that trial was being held? A. In Honolulu here.

Q. There is no doubt in your mind that she was referring to that trial?

A. Oh, yes, she was referring to it.

Cross-Examination

By Mr. Anthony:

Q. Are you employed at Honokaa?

A. Yes.

Q. What is your position?

(Testimony of Mrs. Thelma Olival.)

A. Right now I am woman's editor of the Hilo Tribune Herald.

Q. Did you have anything to do with the newspaper story written in the paper?

A. No, sir, I did not; I was the local correspondent, but I just worked along with him.

Q. Did you make a statement to anyone concerning the matters which you have testified to this morning? A. Yes.

Q. To whom?

A. To two gentlemen who called on me.

Q. From the F.B.I.? A. Yes. [37]

Q. Did you type a statement? A. Yes.

Q. Have you referred to that statement this morning? A. Not this morning.

Q. When did you refer to it?

A. Yesterday; that was Saturday I saw it.

Q. Where did you get it? Have you it with you? A. No.

Q. Where did you get it?

A. The gentleman who was serving the subpoena had it.

Q. What is his name? A. Mr. Afook.

Mr. Anthony: May I have the statement, Mr. Prosecutor?

Mr. Barlow: I have the statement, but I won't produce it to Mr. Anthony unless the Committee orders me to, and the F.B.I. releases it to me, but no one else.

(Argument.)

(Testimony of Mrs. Thelma Olival.)

Mr. Anthony: Here is a witness who made a written statement and she has testified she refreshed her memory from a written statement yesterday, and it is in the possession of the prosecution. I know of no rule of evidence that denies access to that document.

Mr. Barlow: May I ask the Committee Chairman, when he calls the meeting before the Bar Association a prosecution to correct him.

Chairman Pratt: I think probably, Mr. Anthony, that is probably not the correct name to use.

(Discussion.)

Mr. Anthony: I am certainly entitled to the document. [38]

Chairman Pratt: I think, Mr. Anthony, since the Committee has voted that it should subpoena the gentleman from the F.B.I. to produce those original notes, if he has them, perhaps at the same time we could ask him to produce that statement, if that is satisfactory.

Mr. Anthony: That's all right, but here Mr. Barlow has in his possession a statement concerning which I would like to cross-examine the witness on, and I see no reason whatsoever why there should be any delay in these proceedings.

Mr. Peters: Please tell me on what ground you are entitled to see a copy of this affidavit or statement made by the witness.

Mr. Anthony: Why, it is fundamental in the rules of criminal procedure where a witness on the

(Testimony of Mrs. Thelma Olival.)

witness stand is given a written statement in the trial of a case wherein she is testifying, and testifies that she has refreshed her memory from it, I am entitled to examine the witness and have that statement.

Mr. Peters: That is a new one on me.

Mr. Barlow: There is no testimony that the witness has refreshed her recollection.

Mr. Pratt: May we have the statement read?

(Testimony in question read by reporter.)

Mr. Pratt: That was my understanding of her statement, Mr. Barlow.

Mr. Anthony: You, yourself, concede that you have got it. [39]

(Discussion.)

Mr. Anthony: I will be glad to submit authorities on that. I am convinced, Judge Peters, that I am entitled to have it.

Mr. Peters: I am perfectly willing to take the ruling of the Committee, and leave me out.

(Discussion and argument.)

Mr. Barlow: If Mr. Anthony would stipulate, I would be happy to put the statement into evidence, as I will the other witnesses who have testified.

Mr. Anthony: I am not calling for anything like that.

Chairman Pratt: He is either entitled to it, or he is not.

(Testimony of Mrs. Thelma Olival.)

(Argument.)

Chairman Pratt: Might I suggest, Mr. Anthony, that the witness be withdrawn, and the Bar Association session proceed, and the witness be instructed to attend the next session, so we can all look it up.

Mr. Barlow: There is one problem, she is here from Honokaa, and there is the question of whether she should stay in town alone.

The Witness: From Hilo.

Mr. Barlow: Do you intend to go back today?

The Witness: No, not until Wednesday.

Chairman Pratt: Can't we ascertain by tomorrow morning what the state of the law is, and you present some authorities? Perhaps we could have it at the 1:30 session this afternoon, if counsel can present some argument and [40] perhaps in the meantime Mr. Barlow can ascertain whether the persons from whom he obtained these will permit the release.

(Argument.)

Mr. Barlow: I can say I would be happy to introduce all of the statements if Mr. Anthony——

Mr. Anthony: We disposed of that, and I am not going to hear it any more.

Chairman Pratt: May we proceed upon the understanding that we will have some authorities submitted at a session this afternoon, as to whether or not counsel's request for this document should be

(Testimony of Mrs. Thelma Olival.)

allowed? Are there any further questions, Mr. Anthony?

Mr. Anthony: Well, my hands are tied. I would like to know if she can come back here at 1:30.

Chairman Pratt: Other than that, you have no further questions of the witness?

Mr. Anthony: I don't know whether I have any questions or not.

(Discussion.)

Chairman Pratt (to Witness): Will you please return at 1:30, for further cross-examination?

The Witness: Yes.

(Witness excused.)

Mr. Barlow: May it please the Chairman, all the other witnesses are in the same category, and if that is the ruling of the Chair we might just as well adjourn until 1:30, until we settle it once and for all.

Mr. Anthony: None of the other witnesses has testified to refreshing their memory from statements made [41] to the F.B.I. She is the only witness who has referred to refreshing her memory.

Mr. Barlow: Well, I will put on the next witness.

Mr. Anthony: May I call this to the Committee's attention? He says I cannot have the statement now, and we have to delay this proceeding because Mr. Barlow says he has got to get permission, and yet at the same time he is prepared, if I am willing

to admit the document in evidence, to broadcast the thing and allow it to become a public record; a complete non sequitur, thereby disposing, once and for all, of the necessity for him to get any clearance whatsoever.

Mr. Barlow: They are for different purposes; two different purposes. I would like to call that to the Committee's attention.

Chairman Pratt: Will you proceed with your witness?

DANIEL S. RAMOS

called as a witness, being duly sworn, testified as follows.

Chairman Pratt: Please state your name.

The Witness: Daniel S. Ramos.

Direct Examination

By Mr. Barlow:

Q. Mr. Ramos, how old are you?

A. Forty-six.

Q. On December 14th, 1952, did you have occasion to visit the People's Theater at Honokaa?

A. What is that?

Q. On December 14th did you go to the People's Theater at Honokaa? A. Yes. [42]

Q. Did you hear a speech made by Mrs. Bouslog? A. Yes, I did.

Q. Would you tell the Committee to the best of your recollection what Mrs. Bouslog said at that time?

A. Well, it was a general speech. I thought it

(Testimony of Daniel S. Ramos.)

was a good speech. She had no notes. She just came out and spoke, and I recall her saying that there was no fair trial in the Smith Act case.

Member: I cannot hear him.

A. I said she said there was no fair trial in the Smith Act case. I did hear her. It has been so long that most of it I have forgotten.

Q. What?

A. It has been so long most of it I cannot recall what else was said there. I know she stated different examples. One of the examples was about a man working for Sears-Roebuck being dismissed because he refused to testify.

Q. What about that?

A. I think she was just taking an example; there was a man working for Sears-Roebuck and he was dismissed because he refused to testify.

Q. What is your occupation, Mr. Ramos?

A. I am a clerk at the Honokaa Sugar Company.

Q. Are you a member of the ILWU?

A. That's right.

Cross-Examination

By Mr. Anthony:

Q. That was a perfectly orderly meeting, was it?

A. Yes, that's right. [43]

Q. No fight, no wrangling?

A. Not that I recall.

Chairman Pratt: Does the Committee have any questions?

(Witness excused.)

ETHEL CHONG ANDRADE

called as a witness, being duly sworn, testified as follows:

Chairman Pratt: What is your name?

The Witness: Ethel Chong Andrade.

Direct Examination

By Mr. Barlow:

Q. Where do you work, Mrs. Andrade?

A. I work for the Honokaa Sugar Company.

Q. How long have you worked there?

A. For approximately seven years.

Q. How far did you go in school?

A. I finished high school, and attended Honolulu Business College.

Q. Do you speak the English language?

A. I think so.

Q. Do you understand the English language?

A. I think so.

Q. On Sunday, December the 14th, 1952, were you in attendance at a rally in the People's Theater in Honokaa? A. Yes, sir.

Q. Did you hear a speech made by Mrs. Bouslog? A. Yes, sir.

Q. Would you tell the Committee to the best of your recollection what Mrs. Bouslog talked about? [44]

A. I think she gave a very excellent speech, and what I can remember quite well was that she said she would like to tell the audience of the horrible and shocking things that went on at the Smith Act

(Testimony of Ethel Chong Andrade.)

trial in Honolulu, and she also gave several illustrations, but, I am sorry, I cannot remember them, and she also said that the Federal government had created the evidence as they went along, and she referred to the F.B.I. men as Federal cops, at which time she received hearty applause from the audience. There were approximately 250 people present. Most of them were union members, and the following day I read——

Chairman Pratt: Just tell us what she said in the meeting.

A. That is the best I can remember is what happened at that time, what she said, and she gave a very interesting talk; very stimulating.

Q. How many people in the audience do you feel understood what Mrs. Bouslog said?

A. Well, there were mostly people from different walks of life, and I know right after the session why there were many bickerings about what she said, and what they thought was right and what they thought was wrong. Most of these people here at this rally were, as I said, union members, and I think—Well, there were lots of discussions and arguments after the rally.

Q. You say they were talking about what was right and what was wrong. Could you elaborate on that a little more.

A. Yes, I think I can. Some of them—— [45]

Mr. Anthony: Now we are in the realm of hearsay, Mr. Chairman. Apparently this has nothing to do with what the defendant did or said, but what

(Testimony of Ethel Chong Andrade.)

somebody else did or said, and I object to this on the ground it is hearsay.

(Argument by Mr. Barlow.)

(Argument.)

Chairman Pratt: Have you any comments to make?

Mr. Anthony: It is certainly hearsay.

Mr. Dodge: I cannot see that it has anything to do with the charge.

Chairman Pratt: I think perhaps you are getting a little far afield, Mr. Barlow. I will sustain the objection.

Mr. Barlow: No further questions.

Mr. Anthony: No questions.

Chairman Pratt: Does the Committee have any questions?

(Witness excused.)

DAVID K. CRABB

called as a witness, being duly sworn, testified as follows:

Chairman Pratt: State your name.

The Witness: David K. Crabb.

Direct Examination

By Mr. Barlow:

Q. Mr. Crabb, where do you live?

A. In Hawaii, Paauhau.

Q. How old are you, Mr. Crabb?

(Testimony of David K. Crabb.)

A. Forty-seven.

Q. What is your present occupation?

A. Office manager of Paauhau Sugar Plantation Company. [46]

Q. On December 15, 1952, what was your occupation? A. Office manager.

Q. Did you have occasion to go to the People's Theater in Honokaa? A. I did.

Q. Did you have occasion to listen to a speech, a talk, made by Mrs. Bouslog? A. I did.

Q. Do you know Mrs. Bouslog?

A. Well, not personally.

Q. Is this the person who made the speech?

A. Yes, I think so.

Q. Will you tell the Committee what Mrs. Bouslog said?

A. Well, that the defendant in the Smith Act trial cannot get a fair trial.

Q. What Smith Act trial was she talking about?

A. The one in Honolulu.

Q. Did she say anything else?

A. And in regard to the communism books, she said those who read those books might be prosecuted.

Q. Did she say anything else?

A. Not that I can remember.

Mr. Barlow: No further questions.

Mr. Anthony: No questions.

Mr. Peters: I do not quite get the significance of that last inquiry; that last answer.

(Witness excused.)

MRS. PHYLLIS P. MORSE

called as a witness, and being duly sworn, testified as follows: [47]

Chairman Pratt: Please state your name.

The Witness: Phyllis P. Morse.

Direct Examination

By Mr. Barlow:

Q. Mrs. Morse, where do you reside?

A. Haina, Hawaii.

Q. How long have you lived there?

A. Approximately seven years.

Q. On Sunday, December 14, 1952, where were you living? A. In Haina.

Q. Do you speak and understand the English language? A. I do.

Q. On Sunday, December 14, 1952, were you present at the People's Theater in Honokaa where Mrs. Bouslog made a speech? A. I was.

Q. Would you tell the members of this Committee exactly what Mrs. Bouslog said, to the best of your recollection?

A. I believe that she said that there was no such thing as a fair trial under the present Smith Act case in Honolulu, and that the newspapers were not giving a full account, a true account, and that from time to time they and we would be coming to the various islands to acquaint a group with the true facts.

Q. Do you know who she meant by "they"?

(Testimony of Mrs. Phyllis P. Morse.)

A. I believe she said "we," meaning the speakers, like Mr. Hall.

Q. Do you remember her saying anything else?

A. Well, she said that the government could submit any evidence they liked at any time, and that they could also [48] use books that might not have any bearing on the case.

Q. Is that the best of your recollection of what she said?

A. Well, she gave various examples of things, that I don't recall, that were going on, in what she called the horrifying, shocking trial.

Q. Did she use those words? A. Yes.

Q. Horrifying and shocking?

A. Horrifying and shocking.

Mr. Barlow: No further questions.

Cross-Examination

By Mr. Anthony:

Q. Mrs. Morse, did you give a statement to the F.B.I.? A. I did.

Q. Have you referred to the statement?

A. I have read it.

Q. Since the committee hearing?

A. I have read it.

Q. When? A. Yesterday.

Q. Where? A. In Hilo.

Q. Do you have a copy there in Hilo?

A. I don't have a copy there, no.

Q. Where did you read it?

(Testimony of Mrs. Phyllis P. Morse.)

A. In the Hilo Hotel.

Q. Who had it? A. Mr. Afook. [49]

Q. This young man sitting at the end of the table there? A. Yes.

Q. Were there other witnesses that were being called from Honokaa at the same time?

A. Yes.

Q. They all had statements, too? A. Yes.

Q. And they referred to their statements?

A. I saw several of them reading them.

Q. Including your husband, I presume?

A. My husband was there.

Chairman Pratt: What is your husband's name, just for the purpose of the record.

The Witness: John D. Morse.

(Witness excused.)

Mr. Barlow: I would like to offer this pamphlet here, by Mrs. Bouslog, and unless—if Mr. Anthony objects to it, I will have to subpoena the people that produced it.

Mr. Anthony: That has no relevancy whatever to this charge. Here is a speech made by the respondent in 1951, more than a year before the alleged overt act was committed. What has that got to do with this trial?

Mr. Barlow: I respectfully submit the speech was made within the time alleged in the indictment. The indictment was returned August 29, 1951, and the speech was made on a later date.

Mr. Anthony: She is not being indicted. She is

(Testimony of Mrs. Phyllis P. Morse.)

charged with what she did on December 15, 1952. Here is a speech she made in 1951. [50]

Mr. Barlow: May I be heard? The purpose of this, among other statements attributed to Mrs. Bouslog—they are being introduced for the purpose of showing the committee a pattern followed by Mrs. Bouslog. Any actions by Mrs. Bouslog subsequent to the time that she became counsel of record is very important in this particular case. The offense charged in the complaint, it is alleged, is a speech at Honokaa, but there are many other speeches that I intend to produce to the committee to show your committee that this was not an isolated act on the part of Mrs. Bouslog and that it was not made in the heat of passion but probably made with some angles to come later on; that this is a definite pattern followed by the attorney in this particular cause and that on each and every opportunity; on each and every occasion she had the opportunity, she made these speeches critical of the proceedings which were pending in the Federal District Court at that time, and that is the reason and purpose behind this offer, and I respectfully submit that we have a right to show your committee the behavior pattern of this defendant during the trial.

Mr. Anthony: They have no such right. We are charged with a complaint. We have been furnished with a bill of particulars alleging two alleged wrongful acts; one, the speech made at Honokaa, which is supposed to be in contempt of the United States

District Court, and another, the filing of an affidavit or group of papers. What this speech so made in 1951 can possibly have to do with that, I fail to see. If the committee is going to adopt any such rule then we [51] could take the woman's entire life and interrogate her as to what speeches she made for the C.I.O. or the War Labor Board and try those. Is this committee going into those byways in this hearing, and make a resume of her past life and writings to determine whether or not the current charge is a valid one? I should say not.

Mr. Barlow: May I correct the record; the bills of particulars furnished Mr. Anthony was only on the second count, whatever the number of that is.

Mr. Anthony: I presume whatever particulars there were they were furnished.

Mr. Barlow: We were only asked with respect to count number 3.

Chairman Pratt: That is correct, as far as the records of the committee is concerned.

Mr. Anthony: I didn't ask him for anything, but we do know what we are charged with here, and we are certainly not obliged to sit by and say nothing while this evidence, which is wholly unrelated to the charge contained in the complaint, or the bill of particulars, is being offered.

(Argument.)

Chairman Pratt: Has the committee any comments?

We will take this matter under advisement, since

it is purely a pamphlet, and I would suggest we might give you a ruling at 1:30, when we reconvene.

Mr. Barlow: All right, sir, and while we are at it, we propose to introduce various editions of the newspapers carrying speeches and stories alleged to have been made by Mrs. Bouslog. [52]

Chairman Pratt: Upon what date? Do you mean antedating December 14, 1952?

Mr. Barlow: That's right, sir. Speeches made prior to and subsequent to this time, but during the pendency of the Smith Act case.

Chairman Pratt: About the Smith Act case?

Mr. Barlow: About the Smith Act case and what is going on in the Smith Act case.

(Discussion.)

Mr. Peters: What is your authority? Have you any authority to support your position?

Mr. Barlow: I have no authorities with relation to the disbarment, or as to proceedings wherein matters of this kind were offered and ruled upon by a committee, but I do have authorities, Judge Peters, to the effect that in a criminal case if a person is being charged with a particular offense that we can introduce evidence of other offenses committed by that defendant, even though that offense is not alleged or contained in the indictment.

Mr. Peters: Oh, yes, but this kind of a case——

Mr. Barlow: That is the same theory, and I am offering these statements by this defendant. It is on the same theory.

(Discussion and argument.)

Chairman Pratt: I think we ought to consider this matter, because it is a matter of importance, and to decide on the procedure I believe we should take it under advisement.

I think at this time we will take a recess until 1:30. [53]

Mr. Barlow: I would like to talk to the Committee, and Mr. Anthony, just for about two minutes, without anybody else being present, if that is possible.

Mr. Anthony: We have no objection to you speaking out right now.

Mr. Barlow: I would like to speak with Mr. Anthony and the Committee.

Mr. Anthony: How about Mr. Afook, is he going to be there?

Mr. Barlow: Mr. Barlow would like to approach the bench with a request. That is done every day in court, and if the Committee feels they ought to have everybody present, fine. I feel that Mr. Anthony and I can transact this business with the Committee without anybody else being present.

Mr. Peters: That is all jake with me, provided Mr. Marumoto withdraw.

Chairman Pratt: If the rest of you want to step out for a minute, we will see what Mr. Barlow has to present.

(Adjourned to 1:30.)

1:30 o'Clock P.M.

All present as before, except for Mr. Marumoto.

Chairman Pratt: The Committee has discussed the introduction of the offered document, Mr. Barlow, and does not feel that at the present time this document should be permitted, but not preventing you, perhaps, from presenting it at a subsequent time in the proceeding, or for some other [54] purpose, but at the present time they do not think that those are admissible.

Mr. Barlow: You indicated that the procedure was to be informal, and everything that has come up so far is very close to the line. I am not being critical of the Committee, but that is why I considered this informal procedure, of going through to see if this was a statement of the article appearing in the paper. If the Committee feels I should confine myself strictly according to the precepts of the established law courts, I would like to know it so I can control my behavior in the future on the matters I intend to go into.

Chairman Pratt: As I explained to you heretofore, the Committee is not handling the proceedings on the strict rules of evidence in every respect, and I might say on this particular question the Committee is not in unanimity in this conclusion. However, since the particular charge has to do with December 14, 1952, it seems to us, and I think there was other evidence proposed, or other evidence which might be produced, which indicated what you contend happened, or what happened then wasn't

so, and we thought we ought not admit other evidence which might show a prior intent.

Mr. Barlow: I think I have attempted to be consistent with the feeling of the Committee. I just wanted to know how to proceed.

Now this morning, on the statement that was shown to Mrs. Thelma Olival, I talked to Mr. Afook, and [55] Mr. Afook tells me that this is the statement that he showed to her. I am perfectly willing for Mr. Anthony to have this statement that she saw the other day, but I would also like her to read it and find out if it is the same statement that Mr. Afook showed to her, so that she will know what she is testifying about or testifying from, herself.

Chairman Pratt: Well, under the circumstances, and we were checking up on the law during the recess, under the circumstances shown we won't have to argue the point.

Mr. Barlow: I was in a very unique position this morning. I got statements from the F.B.I. and they told me that was not to go out of my hands, and I find the statements I was using this morning are statements that Mr. Afook had copied from statements, and that is why I would like the woman to read that statement, to make sure of this statement; that it was the statement that she saw; that Mr. Afook showed to her, because I don't know whether that is the same statement she gave originally to the F.B.I.

Mr. Anthony: May I have a chance to read it.

Maybe I won't want to ask the witness anything about it.

Have you the rest of them here?

Mr. Barlow: No; we were only involved in that one statement. You asked the woman whether her husband had read the statement. You did not lay a foundation for any particular statement at all.

Mr. Anthony: I understand you will not produce them; is that what I understand?

Mr. Barlow: I did not understand you asked for them; [56] not having laid a foundation if you had wanted them, and now you want them.

Mr. Anthony: I asked you for them and you declined to produce them on the ground you had not got a release. I will repeat my request. Will you or not produce the statements?

Mr. Barlow: I will be happy to let you see all the statements of the witnesses who are testifying, if you want them.

Mr. Anthony: I have no questions of this witness.

Chairman Pratt: Mr. Barlow, is there any reason to recall her?

Mr. Barlow: No, I have no reason to recall her.

Chairman Pratt: Will you tell her that she may be excused.

(Mrs. Olival excused.)

Mr. Peters: Mr. Barlow, I would like the record to show what you are handing to counsel, and what is going on here.

Mr. Anthony: What has been handed me, Judge

Peters, is a portion of the file, of pages 12, 13, 14, 15, 16, 17, and 11, and another fragment of a page which is unnumbered.

Chairman Pratt: I think it might be advisable, Mr. Anthony, to indicate what those purport to be pages of, if they are not going to be offered in evidence. We might have it on the record that they are purporting to be statements of certain witnesses, or something of that kind.

Mr. Anthony: This is obviously a partial extract of what I have requested, with certain deletions, and it is [57] not very helpful to me. I have no objection to reading the names.

Mr. Barlow: I disagree with Mr. Anthony; they are not extracts and they are not deletions. I was asked this morning to produce the papers that I was using in the examination of these witnesses, and I was asked to produce the statements that these people used to refresh their recollection, and these are complete and full statements that these witnesses saw and used to refresh their recollection.

Mr. Anthony: Are we taking evidence now, or is Mr. Barlow——

Mr. Peters: My thought here was, Mr. Anthony—I asked if counsel would take the Committee into its confidence and tell them what they were doing.

Mr. Anthony: I will do that, your Honor, in great fragmentary form. I have a portion of page 11 of a statement——

Mr. Barlow: May I recapitulate what I gave Mr. Anthony? I think I can handle it all right.

There is a portion of page 11; and page 12, and page 13, and at the top of page 13 it says "John D. Morse," and then it goes on, on pages 14, 15, and the top of page 15, Phyllis P. Morse, and page 16, at the top, Ethel Andrade, and page 17, Gilbert Ferreira, and an unnumbered part of a page, of a segment from David Ramos, and a portion of page 9, and page 10, of the statement of Thelma B. Olival.

Chairman Pratt: 11 and 12 you did not identify. Is that part of the one on 9? Is that Mrs. Olival's statement? [58]

Mr. Barlow: No, that is Mr. Morse.

Chairman Pratt: Mr. Morse's name appears, however?

Mr. Barlow: Yes, that's right. And page 11, that is John Morse, making the following statement, as part of 11, and it goes through 12, and to the top of 13.

Mr. Anthony: That is not very helpful to me unless I have the complete documents, which apparently are not to be furnished.

Mr. Barlow: May I make a statement to the Committee?

Chairman Pratt: Very well.

Mr. Barlow: And if I am in error I wish the Committee would straighten me out. As a part of this morning's procedure Mr. Anthony wanted to see statements that these people used to refresh their recollection, and Mr. Anthony says that I have that statement on my desk and was using it, and I told Mr. Anthony that he was right, that I

had it, and I was using it. Now this afternoon I am offering Mr. Anthony the very statements that I had on my desk, and Mr. Afook tells me that he used to refresh the recollection and memory of these witnesses. They are full, complete statements of the witnesses that testified under oath. The reason why we were tearing some portions of sheets out, is because we have about 11 or 12 or 14 witnesses, and I instructed Mr. Afook to only bring six or seven, because of financial considerations, and I don't think that Mr. Anthony should be shown the statements of other witnesses that I have here. Now if Mr. Anthony wants that, and the Committee wants me to give it to him, I have no objection [59] to letting him see it, but I would say it serves no useful purpose.

Mr. Anthony: Cannot we get on. This is unsatisfactory to me. I would like to have the complete documents, but he won't give them to me.

Mr. Barlow: Maybe I am stupid, but I don't know what he wants. This morning you had the complete file that was with us here.

Mr. Anthony: It was mutiliated; there was page 11 with four lines on it. I saw it there on your desk.

Mr. Barlow: Yes, it is, and we could ask Mr. Muramoto and Mr. Afook to testify whether it is or not.

Mr. Anthony: Mr. Chairman, I suggest we go on with the hearing.

Chairman Pratt: It seems to me, Mr. Anthony, he produced it, and which he said was his complete

file with respect to these particular witnesses. Now as far as I recall it, that was your request. Do you want a statement that these people used this to refresh their recollection?

Mr. Anthony: Let's call Mrs. Olival back to the stand and let's ask her if that is all the statements that Mr. Afook showed her.

Chairman Pratt: I don't think we need go further into that. I think you can proceed, Mr. Barlow.

Mr. Barlow: Does the Committee then say to me I do not have to produce any records for Mr. Anthony in accordance with his request this morning, or I have made a proper offer and Mr. Anthony has refused to accept it? [60]

Mr. Anthony: Let's not have any absurd comments as this thing goes along. Everybody knows what transpired. Let's go on with the case.

Mr. Barlow: I think the record should be complete.

Chairman Pratt: I think it shows what you offered, and the fact that he rejected it. I think that is all we need for the moment.

Mr. Barlow: All right, sir.

Now I know the Court has made a ruling about the introduction of this pamphlet, and asked me if I had any citations to substantiate my position, and I want to give the Court two citations that I was using in my argument this morning, so the Committee will know that I had a proper basis for my attempt to introduce the pamphlet. The first one is

(Dexter) vs. United States, 118 Federal 2, 737, and the other was (Thropp) vs. United States, 211 Federal 2nd, 513. I might state to the Chairman of the Committee that they are both 9th Circuit Court of Appeals cases.

Chairman Pratt: Do they involve criminal proceedings?

Mr. Barlow: Yes, that's right, and pertain to the question of whether prior and subsequent acts of a similar nature could be introduced at a trial.

Mr. Peters: That is, used as a part of the case in chief, Mr. Barlow?

Mr. Barlow: Yes, sir. That completes all our presentation of the evidence on the first count. Now I don't know whether the Committee wishes to proceed with Count 2, or does the Committee want to take up any defense that the defendant might wish to produce? [61]

Mr. Anthony: Let's get on with the case.

Chairman Pratt: I think we ought to have the whole matter presented.

Mr. Barlow: The whole matter. Am I to understand correctly that the affidavit, presumably that was filed by Mrs. Bouslog, is in evidence?

Chairman Pratt: There is a stipulation to the effect that the bill of particulars correctly sets forth the affidavit, subject to check by them.

Mr. Barlow: There is no need for me to put in another copy of the affidavit. Is that satisfactory?

Chairman Pratt: I think it might be wise for Mr. Anthony to advise the Committee if there are any imperfections in it.

Mr. Anthony: I will do that promptly.

Chairman Pratt: Proceed, then, to the second count.

DAVID P. FULLER, JR.

called as a witness, being duly sworn, testified as follows:

Chairman Pratt: Please state your name.

The Witness: David P. Fuller, Jr.

Direct Examination

By Mr. Barlow:

Q. Mr. Fuller, where do you live?

A. 1734 Colburn Street.

Q. How old are you? A. 43.

Q. Where are you employed?

A. Kalihi, Honolulu.

Q. By whom are you employed? [62]

A. Castle & Cooke Terminals.

Q. Mr. Fuller, were you a juror in the Smith Act trial? A. Yes.

Q. In the Federal District Court?

A. Yes.

Q. Involving, amongst other defendants, Jack Hall? A. Yes.

Q. Are you familiar with or do you know Mrs. Bouslog? A. Yes.

Q. Have you seen her before? A. Yes.

Q. Did you see her during the Smith Act trial?

A. I don't remember.

Q. Now do you recall the evening of Friday, June 26th, 1953? A. No.

(Testimony of David P. Fuller, Jr.)

Q. You do not? A. No.

Q. Do you recall Mrs. Bouslog being to your home on that night? A. No.

Q. Do you recall having a conversation with Mrs. Bouslog on that evening? A. No.

Q. Now on Saturday afternoon, June 27, 1953, did you see Mrs. Bouslog at your home?

A. No.

Q. Do you remember seeing her at your home on that afternoon? A. No.

Q. Did you have a conversation with her?

A. No. [63]

Q. Do you recall seeing Mrs. Bouslog in your home any time after the verdict was reached in the recent Smith Act trial?

A. Do you mean the—It could have been anybody. I don't remember Mrs. Bouslog or Miss Bouslog. Any woman.

Q. What?

A. It could have been any woman.

Cross-Examination

By Mr. Anthony:

Q. Mr. Fuller, are you working now?

A. Yes.

Q. What are you doing?

A. Special officer.

Q. Office work? A. Officer work.

Q. Where?

(Testimony of David P. Fuller, Jr.)

A. Having charge of the gate, if I am assigned to the gate.

Q. Where? A. Wharf patrol.

Q. Is that Castle & Cooke Terminals?

A. Yes.

Q. How long have you been working for Castle & Cooke Terminals? A. Seven years.

Q. And are you doing the same kind of work you were doing several years ago? A. Yes.

Q. You had charge of the gate before, did you?

A. Yes.

Q. What do you do, having charge of the gate? [64]

A. Well, just check the people coming in and out, and also we check people in and out of the gates, and keep unauthorized persons out; only the truckloads of cargo come out from the pier.

Q. And you got quite sick, did you not, Mr. Fuller, shortly after the trial in the Federal court?

A. Yes, I think so.

Q. Can you tell us what was the matter with you, if you know? A. No.

Q. Did you have a doctor?

A. She called Dr. Chang.

Q. Do you remember Dr. Chang?

A. Yes, I remember Dr. Chang.

Q. And he came to see you, did he?

A. I don't know.

Member: What?

Mr. Anthony: The answer was "I don't know."

(Testimony of David P. Fuller, Jr.)

Q. Now were you put in the hospital, Mr. Fuller; did you go to the hospital?

A. That is what my wife says.

Q. Where was that hospital, Mr. Fuller?

A. Queen's.

Q. In the Queen's? A. Yes.

Q. And how long were you in there?

A. I was there about one month.

Q. Do you have any recollection now of being in the Queen's Hospital? A. No, no. [65]

Q. Your memory is gone as to that, is that right? A. Yes.

Q. You do not have any memory now as to what happened immediately after the verdict in the Smith Act case? Do you have any recollection of that? A. No.

Q. Do you remember praying? Do you remember praying to God? A. When?

Q. After the trial?

A. I don't remember.

Q. Are you a religious man, Mr. Fuller?

A. Well, I pray.

Q. Did you pray about this case? A. Yes.

Q. More than once? A. Two times.

Q. Two times. To the best of your memory when was that, Mr. Fuller? A. Yesterday.

Q. And when was the time before that?

A. Saturday.

Q. Any time before that? A. No. No.

Q. Do you know Mrs. Bouslog here?

A. Now I see her. That is Mrs. Bouslog.

(Testimony of David P. Fuller, Jr.)

Q. When was the first time you saw her?

A. I don't remember. I don't know that.

Q. You remember seeing her shortly after the verdict in the Smith Act case? [66]

A. No, I don't remember.

Q. Is this the first time you have ever seen her, today?

A. Yes, this morning, when she came in.

Q. This morning? A. Yes.

Q. And you don't think you have ever seen her before? A. No, I cannot remember.

Q. Where do you live, Mr. Fuller?

A. 1734 Colburn Street.

Q. Who else lives there with you?

A. My wife and the children.

Q. What is your wife's name?

A. Helen.

Q. Do you remember where you went after you left the Queen's Hospital? A. No.

Q. Do you remember going over to the Territorial Hospital at Kaneohe?

A. That is where I was staying for awhile.

Q. Do you recall of having shock treatments for your illness?

A. I don't know, but the last time that I remember going there and getting on a table.

Q. Is that in Kaneohe? A. Yes.

Q. What did they do when they got you on the table?

A. Oh, they put sticks and things in my mouth (illustrating) and I passed right out.

(Testimony of David P. Fuller, Jr.)

Q. Your hands were fastened and then you blacked out, is that right? [67]

A. I don't know if it was fastened on the table, but I know they were putting my arms on my body.

Q. Do you remember sitting as a juror in the Federal court? A. Yes.

Q. Do you know what that case was about?

A. Well, the Smith Act case.

Q. What is the Smith Act case, do you know?

Mr. Barlow: Your Honor, I object to this line of questions. It is entirely irrelevant and immaterial. We are not trying the juror here and his qualifications, as to what the Smith Act case is. We are only trying Mrs. Bouslog on the affidavit which she signed.

Mr. Anthony: I think the Committee would like to know the extent of the witness' recollection of the past events, and that is the only purpose of it.

Mr. Barlow: I think he can recall those events without going into his knowledge of the Smith Act case, and what a Smith Act trial is. I doubt seriously that there are many lawyers who know what a Smith Act trial is all about.

Chairman Pratt: We might permit this question. I don't think you can go into it to any great length.

Q. Do you know what the Smith Act case was about? A. (No response.)

Q. I don't want to hurry you, Mr. Fuller, but you don't have any knowledge about that, is that

(Testimony of David P. Fuller, Jr.)

your trouble now? A. (No audible reply.)

Q. Do you remember, this man here, being there at that hearing; this man at my left?

A. Yes. [68]

Q. Did you see him there?

A. I don't remember.

Q. Do you remember this girl being there?

A. (No response.)

Q. Mr. Fuller, have you talked with the F.B.I. about this proceeding? A. No.

Q. Never?

Chairman Pratt: Are you talking about this hearing here?

Mr. Anthony: Yes.

A. No.

Q. Did you talk to them about the Smith Act case?

Mr. Barlow: I object to the question as being immaterial.

Chairman Pratt: I will sustain the objection.

Q. Did you talk to them about the affidavit of Mrs. Bouslog? A. No.

Q. You have talked to nobody about that affidavit or the Smith Act case, is that right?

A. (No response.)

Q. Could it be that you have talked with lots of people in the F.B.I. and that you have no present recollection of it? A. Possible.

Q. You are still under medical treatment, are you? A. Medical treatment?

Q. Yes.

(Testimony of David P. Fuller, Jr.)

A. I go down for interviews. [69]

Q. Where do you go?

A. Down to the Territorial Hospital.

Q. How often? A. Every three months.

Q. When was the last time?

A. November 7th.

Q. Mr. Fuller, you remember when you sat as a juror in the Smith Act case; you were in good health then, weren't you? A. Yes, sir.

Q. And you had never been sick before, seriously sick, had you?

Mr. Barlow: Mr. Chairman, I object to this line of questions as immaterial and far afield, and as having nothing to do with the case; the issues in this case. I don't know what foundation Mr. Anthony is trying to lay for the Smith Act trial, but we are only interested in this one act, and that is about the affidavit involved in this case.

Mr. Anthony: That is the whole point of it; this goes on to the affidavit. Thus far the witness has corroborated the statement in the affidavit that he got sick right after the trial. This is competent on the affidavit, and I would like to close the examination, having examined on that fact.

Chairman Pratt: I think he is entitled to ascertain his condition of health.

Q. It was directly following the verdict of the Smith Act case that you got very sick, isn't that true, Mr. Fuller? A. Yes.

Q. And you have been very sick ever since then? A. Today?

(Testimony of David P. Fuller, Jr.)

Q. Isn't that true? A. Yes.

(Witness excused.) [70]

MRS. HELEN FULLER

called as a witness, being duly sworn, testified as follows:

Chairman Pratt: What is your name?

The Witness: Mrs. Helen Fuller.

Direct Examination

By Mr. Barlow:

Q. Mrs. Fuller, are you the wife of David P. Fuller, who was just in here? A. Yes, I am.

Q. How long have you been married?

A. Seventeen years.

Q. Where do you live?

A. 1734 Colburn Street.

Q. Do you know whether your husband was called as a juror in what we call the Smith Act trial? A. Yes.

Q. Do you recall the Friday of June 19, 1953, after the verdict was rendered in that case, your husband coming home?

A. He came home that Friday, but he didn't say much; he just said "Everything is over."

Q. Now do you recall June the 20th, the next day?

A. The next day, about five in the morning, when I got up, I found him down on his knees

(Testimony of Mrs. Helen Fuller.)

and I looked at him, and he told me to forgive him for his sins.

Q. Did he ask to see anybody?

A. Yes, he said he wanted to see the Judge.

Q. Did he tell you why he wanted to see the Judge? A. No, he didn't say.

Q. Do you recall Ellen Fuller Cabreros, and Grace Oshiro [71] visiting you sometime in June, 1953?

A. Yes. Ellen came over to the house, and I didn't know what she came for, though, but since she told me——

Mr. Anthony: That is objected to, what Ellen told her. Ellen is presumably under subpoena.

Chairman Pratt: Any comments?

Q. Don't say what Ellen told you. Just relate to the Committee what happened. After Ellen came to your house she said something to you, is that right? Don't tell us what she said.

A. She said something.

Q. Then you said something to her. What did you say to her?

Mr. Anthony: That is hearsay also. It is a self-serving statement, and as far as this cause is concerned it is hearsay.

(Argument.)

Chairman Pratt: Mr. Barlow, what is the purpose of the examination as to what she said? Does it have something to do with Mrs. Bouslog?

(Testimony of Mrs. Helen Fuller.)

Mr. Barlow: That's right, your Honor. It is very material, so far as Mrs. Bouslog is concerned.

Chairman Pratt: Do you plan to show that she was present at the time?

Mr. Barlow: No, I don't, but she came there subsequent to the conversation. She is allowed, under all legal rules of evidence, to testify to what she said.

Chairman Pratt: I think we might proceed with the examination. He is apparently laying some background for something.

Mr. Anthony: I think it is inadmissible in [72] evidence, and I would like to have a ruling of the Committee on it. After all here is an unsworn statement, and self-serving.

Chairman Pratt: She is under oath, Mr. Anthony; it is not a question of an unsworn statement.

Mr. Anthony: This is an unsworn statement she is about to relate; out of the presence of the defendant.

Chairman Pratt: I don't understand it is a self-serving statement. She is not a party. I don't see how it can be self-serving.

Mr. Anthony: Anything outside the presence of Mrs. Bouslog would be a self-serving statement.

(Argument.)

Chairman Pratt: Are there any comments from the Committee members? Let's proceed with the question.

(Testimony of Mrs. Helen Fuller.)

(Last question read by reporter.)

A. I didn't tell Ellen nothing.

Q. Now did you suggest to Ellen that she bring Mrs. Bouslog to see your husband?

A. No, I did not. She told me that Bouslog——

Mr. Anthony: I object to that as hearsay; that is what Ellen said. Cannot we get a little order out of this? Now we are multiplying the hearsay here.

Chairman Pratt: Can you elicit what you want, Mr. Barlow, without getting into what Ellen said?

Q. Whose suggestion was it that Mrs. Bouslog come to see your husband? A. It was Ellen's.

Q. Now did Mrs. Bouslog come to see your husband that night? A. She did. [73]

Q. And what time of the night was it?

A. Oh, it was the early part. I think it was a little after four, I think it was.

Q. And who came with Mrs. Bouslog?

A. Grace Oshiro.

Q. Did anybody else come? A. No.

Q. Now when Mrs. Bouslog got there who was in the house?

A. There was me, my daughter, Ellen, and my husband.

Q. What is your daughter's name?

A. Margaret.

Q. By Ellen you refer to Ellen Cabreros?

A. Yes.

Q. Is that your husband's sister? A. Yes.

(Testimony of Mrs. Helen Fuller.)

Q. Now when Mrs. Bouslog got there, what did she say, if anything?

A. She said she wanted to see my husband alone.

Q. And what did you say?

A. I didn't say nothing. She went in there.

Q. And did she see your husband alone?

A. She did.

Q. How long would you say that she was in the bedroom with your husband alone?

A. Oh, about ten minutes.

Q. And then what happened?

A. Dr. Chang came in.

Q. And then?

A. He attended my husband. I wasn't there when he came. He [74] examined him.

Q. Did Dr. Chang examine your husband?

A. Yes.

Q. Was Mrs. Bouslog at the examination?

A. No.

Q. Had she gone outside?

A. She went in the parlor.

Q. And was she waiting outside while the examination was in progress?

A. You mean outside of the house?

Q. No, in the parlor? A. In the parlor.

Q. Was she waiting outside? A. Yes.

Q. And did Dr. Chang examine your husband?

A. Yes.

Q. Could you tell us, on that occasion, whether your husband recognized Dr. Chang or not?

A. No, he did not.

(Testimony of Mrs. Helen Fuller.)

Q. Now after Dr. Chang left, what happened?

A. Then we all went back in; that is, Grace and Bouslog, and my daughter Margaret, and Ellen.

Q. And then was there a conversation?

A. My husband did not say a word.

Q. What went on?

A. She asked my husband questions; I don't remember what it was now, exactly what it was, and she took some notes down.

Q. And what was your husband's answer to the questions? A. Nothing. [75]

Q. Did he answer Mrs. Bouslog's questions?

A. No.

Q. What was his reaction to her questions?

A. He just layed there on the bed, is all.

Q. Now did Mrs. Bouslog ask your husband whether he wanted to see Jack Hall, or not?

A. She did.

Q. And what did your husband answer or say?

A. He did not answer.

Q. Now did you at any time say to Mrs. Bouslog that your husband said that he had lied in the eyes of God? A. No.

Q. Did you at any time say that your husband had said that Jack Hall was innocent and the case was a frame-up? A. No.

Q. Did you at any time ever say to Mrs. Bouslog that your husband had told you that Jack Hall was a good man? A. No.

Q. Did you at any time say to Mrs. Bouslog that your husband had said that these people are

(Testimony of Mrs. Helen Fuller.)

doing good for humanity, and here someone was trying to stop them?

A. Bouslog said that. She said that.

Q. It was not your husband? A. No.

Q. It was Bouslog? A. Huh.

Q. Now, did you at any time ever say to Mrs. Bouslog that your husband had said that he wanted to go to Judge Wiig and confess that he, your husband, had lied? A. No. [76]

Q. Who made the statement in the bedroom that the case was a frame-up?

A. Ellen said it was a frame-up.

Q. Did Mrs. Bouslog say anything, or join in that statement? A. I don't remember.

Q. Do you know whether your husband ever told Mrs. Bouslog that he wanted some help to clear his conscience? A. No.

Q. Did you want your husband to see Judge Wiig? A. Beg pardon?

Mr. Anthony: I object to this continuous leading.

Mr. Barlow: It is in the affidavit, and the affidavit is in evidence, and I am examining her on the affidavit.

Mr. Anthony: The affidavit of whom?

Mr. Barlow: The affidavit of Harriet Bouslog—the lawyer. You stipulated to the affidavit being put in evidence.

Chairman Pratt: I think he is entitled to it, anyway, as to whether or not these statements were

(Testimony of Mrs. Helen Fuller.)

made. That is part of the record; supposedly made in her presence.

Mr. Anthony: I am not sure about that, but the complaint does not charge the falsity of the affidavit. There is nothing in the complaint that sets that out.

Mr. Barlow: We are trying to show the circumstances under which the affidavit was taken. We are not attempting to do anything else.

(Argument.)

Chairman Pratt: It seems to me it is in line with the whole thing.

(Discussion.) [77]

Chairman Pratt: I think we will permit the question.

(Last question read by reporter.)

A. Yes.

Q. Did Mrs. Bouslog want your husband to see Judge Wiig? A. No.

Mr. Anthony: Objected to as leading.

Chairman Pratt: The answer is in the negative. Is it very material, Mr. Anthony?

Mr. Anthony: I don't know what is going to come next. I think we ought to get some rhyme or reason out of this proceeding.

Chairman Pratt: I will sustain the objection.

Q. Did Mrs. Bouslog ever ask for permission to talk to David, to get what David would say about what went on in the juryroom?

(Testimony of Mrs. Helen Fuller.)

A. She asked; she wanted David to tell her all what happened in the juryroom.

Q. Did Mrs. Bouslog at that time state whether she had or had not talked or visited with any other jurors? A. She did.

Q. What was her answer?

A. She said that they had talked to other jurors, and that they were going to, from our race, and that some of them were sick just like my husband.

Q. Did you ask Mrs. Bouslog for any names of the jurors she had visited?

A. I did, but she didn't even look at me. She did not give me no answer.

Q. On June the 27th did Mrs. Bouslog and Jack Hall come to [78] see your husband?

A. They did.

Q. Do you know about what time?

A. I think it was after lunch.

Q. Was anybody else at home?

A. Margaret was home. Margaris.

Q. Who is that?

A. Margaret or Margaris.

Q. Do you recall whether your husband said to Mr. Hall, in the presence of Mrs. Bouslog, words to the effect that they had talked with other jurors who were in the juryroom, and who had to vote guilty, and to forget his (promise), because he was afraid he would be fired if he did not?

A. No.

Q. Did your husband in the presence of Mrs. Bouslog say that—or your husband said that it was

(Testimony of Mrs. Helen Fuller.)

not right that the jurors only looked to government exhibits, and not at the defendants' exhibits or cases? A. No.

Q. Did your husband in the presence of yourself say to Mrs. Bouslog that it was a frame-up, and he blamed himself for it? A. No.

Q. Did your husband say to Jack Hall and Mrs. Bouslog on the occasion that he knew and believed the defendants were innocent all the time, but was afraid of what would happen if he voted not guilty? A. No.

Mr. Anthony: I move to strike that, to get my objection in. May it be stricken? [79]

Chairman Pratt: Very well.

Mr. Anthony: What Mr. Barlow is doing, and it is manifestly unfair to the accused here, and I am going to point this out to the Committee, he is taking out this as to Mrs. Bouslog, and it does not say, there is not one sentence in there, that this woman was present at the time of the conversation recited in the affidavit took place. In fact, it says the contrary, and he is asking the witness whether or not she said that. Now, obviously, if the witness on the stand was not present her answer would be "no." I am going to point that out to the committee; I think it is highly improper.

(Argument.)

Chairman Pratt: The witness has testified that she was not present.

(Testimony of Mrs. Helen Fuller.)

Q. Now, on June the 27th, 1953, were you present in the room with your husband when Jack Hall and Mrs. Bouslog were talking with him?

A. Yes.

Q. Were you present at all times?

A. Yes.

Q. While Mrs. Bouslog was there talking to your husband on June the 27th, 1953?

A. That's right.

Q. And the questions I have just asked you, as to whether Mrs. Bouslog said certain things, and whether your husband had made these answers, relate to June the 27th, 1953, when you were present with Mrs. Bouslog and your husband?

A. Yes. [80]

Chairman Pratt: Proceed with the examination.

Q. Will you answer the question? Do you understand the question?

(Question referred to read by reporter.)

A. No.

Q. Now did Mrs. Bouslog and Joseph (Leilihoa), also known as Joe Bell, and Jack Hall, come to see your husband again? A. They did.

Q. Was that on June 28th?

A. I don't remember correctly, but——

Q. About that time or a day later.

A. Three of them.

Q. Now on that occasion did Mrs. Bouslog talk to you about signing an affidavit?

A. Yes. She called me in the kitchen.

(Testimony of Mrs. Helen Fuller.)

Q. And what did she say to you?

A. She told me she would take the responsibility for my husband, so he could get well.

Chairman Pratt: Will you elaborate on that a little bit?

Q. Did she want you to sign an affidavit?

A. I think so, because she brought it.

Q. Did she want you to sign it as your affidavit?

A. I guess so.

Q. What did she say to you? Why did she want you to sign the affidavit?

A. Because, she said, that is the only way my husband can get well, for me to take the responsibility for him.

Q. Did she at any time while she was asking you to sign [81] that affidavit yourself state that your husband David did not know what he was saying or doing? A. She did.

Q. And that is the reason for you to sign the affidavit? A. Yes.

Q. Did you sign the affidavit?

A. I did not.

Q. Did you say anything else to Mrs. Bouslog on that occasion?

A. I told her that my husband was not in his right mind, and he was not responsible for anything that he says at any time.

Mr. Barlow: No further questions.

Mr. Anthony: May we have a short recess, to give the reporter a break.

Chairman Pratt: Yes.

(Recess.)

(Discussion as to setting time for further sessions.)

Chairman Pratt: We will take a recess until nine tomorrow morning.

(Adjourned.)

Reporter's Certificate

Circuit Court, First Judicial Circuit,
Territory of Hawaii:

I Hereby Certify the above and foregoing, pages 1 to 82, inclusive, to be a full, true and correct transcript of my shorthand notes taken in the within-mentioned proceedings, at the time and place therein set forth.

Honolulu, T. H., December 10, 1955.

/s/ R. N. LINN,
Official Shorthand Reporter.
(Now Retired.) [82]

November 23, 1954

Proceedings were resumed as follows:

Chairman Pratt: The witness has been sworn, Mr. Anthony. Do you want to proceed with your cross-examination?

Mr. Anthony: May I proceed, Mr. Chairman?

Chairman Pratt: Yes.

MRS. HELEN FULLER

Cross-Examination

By Mr. Anthony:

Q. Mrs. Fuller, you have already been sworn, have you not? A. Yes.

Q. You were born here? A. Yes.

Q. When were you married? A. 1935.

Q. To David Fuller? A. Yes.

Q. Now you knew that your husband was selected as a juror in the Smith Act trial, did you not? A. Yes.

Q. And did you discuss the case with him from time to time? A. No.

Q. Never? A. No.

Q. You never said a word to him about this trial that was going on for six months? [84]

A. No.

Q. Not one word? A. No.

Q. You are sure of that? A. Yes.

Q. That lasted a long time, didn't it?

A. Yes.

Q. At no time during that entire trial did you ever talk with your husband about the case, is that right?

Mr. Barlow: May it please the Chairman, the question has been asked and answered three times. This is the fourth time.

Mr. Anthony: It is a very significant and very important and searching question.

(Testimony of Mrs. Helen Fuller.)

Chairman Pratt: We will permit this question and no further ones.

Mr. Anthony: Read the question, please.

(The question was read by the reporter.)

A. Yes.

Q. How was your husband's health during the course of this trial?

A. He was all right up to that time.

Q. Was he mentally alert? A. No.

Q. Was there something the matter with his head during that trial? A. No.

Q. Would you say he was in his right mind? [85]

A. Yes.

Q. Now you recall the approximate time of the verdict, do you not, June 20, 1953? You remember that? A. Yes.

Q. Your husband got very sick immediately after the verdict, did he not?

A. Well, not that day that thing was over; he was all right, but afterwards he seemed kind of afraid to leave the house.

Q. The following day did he get sick?

A. Yes.

Q. Was he in bed?

A. Well, he didn't leave the house.

Q. And he was sick more or less continuously after that?

A. Yes; he grew worse and worse each time.

Q. Now you know his sister, do you not?

A. Yes.

(Testimony of Mrs. Helen Fuller.)

Q. Ellen, what is her full name?

A. Ellen Fuller Cabreros.

Q. Do you recall Ellen coming to your home to visit her brother? A. Yes.

Q. Was that on Friday, June 26, 1953, about a week after the verdict?

A. I don't remember exactly what date it was, but I remember the first time she came.

Q. That was about a week after the jury verdict, wasn't it? [86]

Mr. Peters: What date was the jury verdict?

Mr. Anthony: June 20, 1953, your Honor.

Q. That was about a week afterward, wasn't it?

A. No, it wasn't that long.

Q. How long afterward was it?

A. I am not sure now. I think it was about three or four days after my husband was sick that she came.

Q. Did she talk to you?

A. She came in the house. She didn't tell me what she came there for. She just came in the house and I let her in.

Q. I asked you did she talk to you?

A. Yes, she said she heard that my husband was sick.

Q. Did she go in and talk with your husband?

A. She came in the bedroom. My husband wasn't able to talk. He was hoarse from shouting all night.

Q. What was he shouting?

A. Shouting, saying, "The rats and Reds, and

(Testimony of Mrs. Helen Fuller.)

they just waiting for me to come out," and moving his hands in a strange manner, like he was fighting.

Q. Did he shout that he had lied?

A. No.

Q. You are sure of that? A. Yes.

Q. Do you recall having a conversation with Ellen Fuller Cabreros on that day that I have referred to?

A. That is when Bouslog left the house?

Q. No, no; before Mrs. Bouslog's arrival. Do you recall [87] having a conversation with Ellen?

A. Yes.

Q. And what did you tell Ellen that he had been saying?

A. I told Ellen that he wanted to see Judge Wiig.

Q. Did you tell Ellen that your husband said the case was a frame-up?

A. No, Ellen said that. She said she knew it was a frame-up, so I asked her how she knew it was a frame-up. She said, "How could they reach a verdict so soon"?

Q. Do you recall that shortly after that Mrs. Bouslog came to your home?

A. Repeat that.

Q. Shortly after Ellen arrived Mrs. Bouslog came? A. Yes.

Q. And was it you that sent for Mrs. Bouslog, or was it Ellen?

A. I did not. Ellen was the one.

Q. Ellen told you she was going to send for her?

(Testimony of Mrs. Helen Fuller.)

A. Yes.

Q. You didn't raise any objection to that?

A. Well, I told her again that my husband didn't want to see Bouslog, and I didn't want him to because my husband did not want to see her. He wanted to see Judge Wiig.

Q. Your husband told you he didn't want to see Mrs. Bouslog?

A. My husband didn't say that.

Q. How do you know that he didn't want to see her? [88]

A. Nobody asked him about wanting to see Bouslog. Ellen was the one suggested Bouslog come over the house and talk to David, that she didn't want David to see Judge Wiig, might shut him up.

Q. You mean lock him up in jail?

A. I don't know what she meant.

Q. Now you remember shortly after Mrs. Bouslog arrived she asked you whether or not you had sent for a doctor? A. Yes.

Q. What did you say?

A. I said I did. I called the doctor two or three days before that, but the doctor, Dr. Linn, wasn't available.

Q. Dr. who? A. Linn.

Q. He is a psychiatrist? A. Yes.

Q. How did you know that, to call a psychiatrist?

A. I asked Dr. Chang. I called Dr. Chang first and I told him to recommend a psychiatrist because my husband was out of his mind. He said he

(Testimony of Mrs. Helen Fuller.)

couldn't get in touch with—I got in touch with Dr. Linn, but he wasn't available. He said he had a patient up that way and he would drop in and see my husband.

Q. Dr. Chang arrived shortly after Mrs. Bouslog's arrival? A. Yes. [89]

Q. What did you tell Dr. Chang?

A. I told him that my husband wasn't in his right mind.

Q. What else did you tell him?

A. Dr. Chang came in the house and said, "Hi, David," something like that, and he didn't answer. He said he is Dr. Chang and still he didn't answer, and then Dr. Chang said, "What day is today, David?" And he said, "Mother's Day," and Dr. Chang just shook his head.

Q. Now I have asked you the question, what did you tell Dr. Chang, not what the Dr. Chang said. What did you tell him?

A. Nothing. I just told him that my husband was sick and he wasn't in his right mind.

Q. Did you tell him anything about what your husband had been saying in his delirious moments?

A. No.

Q. And what did the doctor say?

A. He just examined him and said there was too much strain for David, that he needed a lot of rest.

Q. And the doctor then left, is that right?

A. Yes.

Q. Now when did Grace Oshiro come to your house?

(Testimony of Mrs. Helen Fuller.)

A. When Ellen told her something and she went down to the street. She was in a car all the time outside.

Q. Who is Ellen?

A. That is my sister-in-law. That is David's sister.

Q. Ellen? [90] A. Ellen.

Q. She came in the house? A. Yes.

Q. And what did she say?

A. She didn't say nothing. They both was in the kitchen. Ellen was making a phone call.

Q. Did she go in and see your husband at all? Did Grace go in to see him?

A. That's right, after Bouslog came.

Q. Did Grace go in? A. Yes.

Q. You weren't in there when they went in?

A. No, we all were in there.

Q. All together?

A. Yes. Bouslog was in there first. She was in there first, and afterward we all went in the bedroom.

Q. Was there any mention of Jack Hall when you were all in there?

A. Yes, Bouslog said that my husband wanted to see Jack Hall.

Q. Are you sure that Mrs. Bouslog said that?

A. Yes.

Q. What did your husband say?

A. Nothing.

Q. Did Mrs. Bouslog say that she would return

(Testimony of Mrs. Helen Fuller.)

and bring Jack Hall? [91] A. Yes.

Q. What did your husband say to that?

A. He didn't say anything.

Q. What did you say to that?

A. I didn't say anything either.

Q. You didn't object to it? A. No.

Q. Now after Mrs. Bouslog had been talking with Mr. Fuller what did she do, after she went in there to talk with him?

A. She said she wanted to leave David and Grace and get some water.

Q. He was asking for a drink of water?

A. No, he did not.

Q. Did he drink the water?

A. Well, he took some.

Q. Did he get better after she gave him some water? A. No, he still remained in bed.

Q. Did he brighten up any?

A. No, he was the same as he was all the time.

Q. Do you recall him asking for a cigaret?

A. Yes, Bouslog asked him if he wanted a cigaret.

Q. Did he take one? A. No.

Q. Now you recall the following day on June 27th when Mrs. Bouslog and Jack Hall returned to your house? A. Yes. [92]

Q. When was that? What time? Early in the morning? A. Yes.

Q. Night or when?

A. I think it was before lunch or after lunch; I'm not sure.

(Testimony of Mrs. Helen Fuller.)

Q. What was the condition of your husband at that time? A. He was worse.

Q. Did he talk with Mrs. Bouslog and Jack Hall?

A. I don't know; he was so hoarse, and mumbling to himself.

Q. Did he ask them not to leave?

A. That is when he was ready to leave?

Q. Yes. A. Yes.

Q. He grabbed hold of Jack Hall's arm, do you recall that? A. I don't remember that.

Q. But he didn't want him to leave?

A. He didn't want nobody to leave, whoever came in the house.

Q. Now Mrs. Fuller, you have given a statement to the FBI, have you not? A. Yes.

Q. How many times have you been interrogated by the FBI in respect to this matter?

A. I don't remember.

Q. Would you say a dozen times? [93]

A. No.

Q. A half dozen?

Mr. Barlow: Just a minute, your Honor. I object to the line of questioning. It is immaterial.

Chairman Pratt: Sustained.

Mr. Anthony: I certainly can ask the witness how many times she has been interrogated. It goes to the credibility of the witness.

Chairman Pratt: On what basis, Mr. Anthony?

Mr. Anthony: It goes to her credibility. After

(Testimony of Mrs. Helen Fuller.)

all, you have got to pass on the weight and credibility of this witness' testimony.

Chairman Pratt: Okay, we will let it in. Would you answer the question?

A. I don't know how many times the FBI came over to the house.

Q. They came shortly after the incident that you have been telling us about, did they not?

A. I guess so, when it came in the paper, they came over to the house.

Q. Did they type up a statement?

A. I don't know what they did.

Q. Did you see a typewritten statement?

A. That was after?

Q. Yes. That was typed up, wasn't it?

A. No, it wasn't. It wasn't typed.

Q. Didn't you ever sign any statement?

A. No. [94]

Q. Did they ever show you any typewritten statement? A. No.

Q. Who else have you talked with, with respect to this matter?

Mr. Barlow: May I ask that the question be clarified? I don't know what it means.

Mr. Anthony: I think everybody else in this room knows.

Mr. Barlow: I would like the witness to be sure she know what she is answering.

Mr. Anthony: The witness hasn't said she isn't sure of anything.

Mr. Barlow: I am speaking on her behalf.

(Testimony of Mrs. Helen Fuller.)

Chairman Pratt: Mrs. Fuller, did you understand Mr. Anthony's question?

The Witness: Yes.

Chairman Pratt: Well, would you please answer it?

Mr. Anthony: Will you read the question, please?

(The question was read by the reporter.)

Mr. Barlow: May I ask the Chairman to have it clarified for me? I don't know what this means.

(Further argument by counsel.)

Mr. Anthony: I will reframe the question.

Q. (By Mr. Anthony): Mrs. Fuller, who else have you talked to about your testimony that you have given here yesterday? A. Mr. Barlow.

Q. Anyone else? [95]

A. I don't know who is that other fellow, what is his name that works with Mr. Barlow. This man sitting at the end of the table, I talked to him, too.

Q. Afook? A. Yes.

Q. Anybody else? A. No, that's all.

Q. Did they ask you to sign any statements?

A. No.

Q. Did they read to you any statements that you have previously given?

A. I don't remember.

Q. Surely you remember whether or not they read to you from a piece of paper and said, "Now, didn't you say this, Mrs. Fuller?"

A. Oh, yes.

(Testimony of Mrs. Helen Fuller.)

Q. They read it to you at great length, isn't that right? A. Yes.

Q. And that was both Mr. Barlow and Mr. Afook, is that right?

Mr. Barlow: I don't want to interrupt, but I would like to have this clarified. My recollection is that the witness said not Mr. Barlow. Am I right?

Q. Did you say not Mr. Barlow?

A. About what?

Q. About reading this statement to you?

A. No, Mr. Barlow didn't read it to me.

Q. Who was it read it to you? [96]

A. It was the FBI.

Q. When was that?

A. That was—that is when he—I don't remember exactly.

Q. Well, was it shortly after the verdict, shortly after this matter came out in the newspaper?

A. Yes.

Q. How about this year, did the FBI read the statement to you any time this year? A. No.

Q. In other words, these visits that you have been talking about have to do with incidents that occurred shortly after the matter of the Bouslog affidavit appeared in the newspaper, is that right?

A. Yes.

Q. Now your subsequent conversations have been with Mr. Barlow, is that right?

A. Yes.

Q. And Mr. Afook? A. It is just for this.

Q. Just for this hearing? A. Yes.

(Testimony of Mrs. Helen Fuller.)

Q. That is within the last week or so?

A. Yes.

Q. Now when was it you saw Mr. Afook?

A. Last week.

Q. And he read a statement to you, is that [97] right?

A. No, he didn't read a statement to me.

Q. I thought you told me before that he read a statement to you? A. No.

Q. Didn't he talk to you about your evidence, about what you were going to say?

A. No, I cannot forget these things, what happened.

Q. Now, maybe I misunderstood you, Mrs. Fuller, but I thought you said that Mr. Afook had read to you from a statement that you had previously given to someone. That is not true? He didn't read it to you?

A. Well, he read something about that, something he read to me. He read all these—I don't know—that I said or what had happened in the home. That is what he read to me about. I said, "Yes, that is true."

Q. Where was this that he read it to you?

A. In my home.

Q. He had a file of papers like this and he started to read them to you, is that right?

A. Yes.

Q. He asked you if that was correct?

A. Yes.

Q. You told him that it was? A. Yes.

(Testimony of Mrs. Helen Fuller.)

Mr. Anthony: If the Committee pleases, we should like to have the investigator produce what he read to the witness on the stand. [98]

Mr. Barlow: To be honest with the Chairman, I don't know what the investigator read to the witness. He is not here now. He had to go out. I will be glad to ask him what he did read to the witness.

Mr. Anthony: I don't care about Mr. Barlow's asking him. I would like to have the document that he read to the witness. I am certainly entitled to it. Mr. Barlow should be directed to produce it.

(Further argument by counsel.)

Chairman Pratt: Mrs. Fuller, did Mr. Afook read this statement to you, or did you read it?

The Witness: He read it to me.

Chairman Pratt: Did you look at it?

The Witness: Yes.

Chairman Pratt: Do you think you would recognize it if you saw it?

The Witness: Yes.

Chairman Pratt: Will you show her the paper?

The Witness: Should I read all of this? This is the same thing.

Chairman Pratt: You think that is the statement that he used?

The Witness: Yes.

Chairman Pratt: Mr. Anthony, do you want to look at it?

Mr. Anthony: May we have a few minutes' recess? This is a five- or six-page document.

(Testimony of Mrs. Helen Fuller.)

Chairman Pratt: We will take a recess. [99]

(Recess.)

Mr. Anthony: May we proceed?

Chairman Pratt: Proceed.

Q. (By Mr. Anthony): Mrs. Fuller, when did Afook first come to interrogate you, about a week ago? A. Yes.

Q. That was on Tuesday, November the 16th?

A. Yes.

Q. He only came once?

A. No, he came twice.

Q. When was the second occasion, when he served the subpoena? A. Yes.

Q. When was that? Do you recall the date?

A. I don't remember.

Mr. Anthony: Does the Chairman have the subpoenas here in the record?

Chairman Pratt: They haven't been returned to me. I don't know where they are.

Q. (By Mr. Anthony): Now, the second time that Mr. Afook came to see you, he handed you this paper, did he not? Will you please identify that?

A. He didn't bring this. I think it was a policeman that brought this.

Q. But that was the second time he saw you. Was he there when the policeman brought it?

A. No, he wasn't. [100]

Q. Well, was the second time before or after you got this paper? A. Yes.

(Testimony of Mrs. Helen Fuller.)

Q. Which was it, after you got this paper?

A. When he read the affidavit to me to refresh my memory, it was the second time he came, but this policeman brought this.

Q. Well, when was the first time he came?

A. It was last week some time he came.

Q. Was that on the 18th or 16th of November?

A. I don't remember dates. That was the 16th of November.

Q. That was the first time he came?

A. That is the first time he came.

Q. That was last Tuesday? A. Yes.

Q. And then when did he come see you again?

A. Two or three days after he came and read the affidavit to me and told me that was correct and I said, "Yes," so I signed it.

Q. Well, the first time he came to see you, he read a statement to you, didn't he?

A. I don't think he read any statements to me. I don't remember.

Q. Well, last week was the first time he ever saw you? A. Yes.

Q. And what did he do on that first occasion?

A. Just talked about this thing, that we might have to [101] come down. And then he said he would bring the affidavit for me to sign.

Q. How long was he there at your home on the first time?

A. Oh, about ten or fifteen minutes.

Q. Did he have any papers with him?

A. No.

(Testimony of Mrs. Helen Fuller.)

Q. Was he taking notes of what you said?

A. No.

Q. And the second time he came with a prepared affidavit and you signed it, is that right?

A. Yes.

Q. Now, you told us yesterday that your husband, shortly after the verdict, early in the morning, you found him on his knees praying for God to forgive him? A. Yes.

Q. Did you ask him why he was praying for God to forgive him?

A. No. He told me—I looked at him, and he was down on his knees, and he told me to forgive him for his sins.

Q. What were his sins?

A. He didn't say what were his sins. He asked the children to forgive him, too.

Q. Didn't he relate that in any way to the verdict? A. No.

Q. Why do you say no before I finish asking my question? A. I'm sorry.

Q. Didn't he indicate in some way that he was talking [102] about the verdict that the jury had rendered in the Smith Act case? A. No.

Q. You wouldn't have any idea what he was talking about, his sins? A. Yes.

Q. You didn't know of any sin that he had committed? A. No.

Q. Mrs. Fuller, are you a devout Catholic?

A. No, I am a Pentecostal.

Q. Pentecostal? A. Yes.

(Testimony of Mrs. Helen Fuller.)

Q. Is that a sect here that they have a church here? A. Yes.

Q. Now, when you saw your husband get so very ill, you remember that? A. Yes.

Q. Didn't you make any effort to find out what was the matter with him?

A. No, it seems to me everything was concerning this case.

Q. That was the whole week before these people came out to your house? A. Yes.

Q. The answer is yes? A. Yes.

Q. It was preying on his mind?

Mr. Barlow: I object to the form of that question. [103] How does she know what was preying on his mind?

A. I don't know what was on his mind.

Q. (By Mr. Anthony): You got the suggestion all right. I asked you whether or not it didn't seem to be preying on his mind, so far as you are concerned?

Mr. Barlow: Just a minute. Don't answer it until the committee rules. I object.

Chairman Pratt: I don't think it is too material at the present time, as far as I can see. The witness has answered your question.

Mr. Anthony: There is no objection pending before the committee.

Chairman Pratt: It seems to me it should be sustained, Mr. Anthony.

Mr. Peters: Mr. Anthony, can't you ask the witness the question as to whether or not from any-

(Testimony of Mrs. Helen Fuller.)

thing that he said or did, did she know what was disturbing him mentally?

Mr. Anthony: I will reframe the question.

Q. Mrs. Fuller, based upon your observation of your husband during that period immediately following the verdict, are you able to say what was disturbing him mentally during that period?

Mr. Barlow: Just a minute, please. I still object to the form of the question, Mr. Chairman. He is still asking the same question in a different way, and he is not following the suggestion, as I understand, [104] made by Judge Peters.

Mr. Peters: That is about as close as I could ask it if I were asking it myself. Evidently counsel wants to know what the trouble was with this gentleman. I think the question is proper, Mr. Barlow.

Mr. Anthony: Read the question, please.

(The question was read by the reporter.)

A. No, I don't know.

Q. Didn't you already tell us that he was talking about the Smith Act case during that period?

A. Well, the things that he said, yes. It must have been from the case.

Q. Isn't it true then that during that week period he was constantly talking about what had gone on in that trial, and that is the thing that was disturbing him, so far as your observation is concerned?

A. I don't know that. All I know is how he was

(Testimony of Mrs. Helen Fuller.)

shouting, hollering "Reds" and all those things like that.

Mr. Peters: What things like that?

A. "Reds and chicken and gamble, and who said that, who said this, and who is me and who is I?" All things like that. And then he would sing; and then he would sing the Star-Spangled Banner, and then he would say, "How about that?" Or, "What about that?"

Q. Didn't your husband tell you that on the first ballot he voted not guilty?

A. No, he didn't say anything about voting guilty or [105] not guilty, or anything like that.

Q. He never mentioned guilty in any of his statements? A. No.

Q. Even when he was asking God to forgive him? A. No.

Q. When he was asking God to forgive him, he was talking about the Smith Act case, wasn't he?

A. No.

Q. How do you know that?

A. Because he didn't say anything of that.

Q. Why do you say no? A. I don't know.

Q. Now, when your husband was shouting that he wanted to see Judge Wiig, you remember that, of course? A. Yes.

Q. That was immediately following the verdict, right? A. Yes.

Q. Your answer is yes?

A. Not immediately.

Q. Well, the next day? A. Yes.

(Testimony of Mrs. Helen Fuller.)

Q. Why did he want to see Judge Wiig?

A. He didn't say.

Q. Now, at the same time that he was shouting to see Judge Wiig, was that the same time that you found him praying and asking God to forgive [106] him?

Q. It was the same day, however, wasn't it?

A. It was in the night.

Q. He was praying in the morning at 5:00 o'clock? A. Yes.

Q. Did he keep on praying from time to time?

A. No.

Q. Is your husband a member of the same sect that you are? A. Yes.

Mr. Anthony: We would like to have Mr. Afook excused from this room. I expect to call him as a hostile witness.

Chairman Pratt: Mr. Afook, will you please step out?

(Mr. Afook left the hearing room.)

Q. (By Mr. Anthony): You have told us, Mrs. Fuller, that your husband, when he wasn't shouting, he was mumbling a good deal, is that right?

A. Sometimes he did.

Q. At times when Mrs. Bouslog visited your husband, was he mumbling then? A. Yes.

Q. And you couldn't hear what he was saying, is that right? A. Yes.

Q. On November 16, 1954, when you signed what you have called the affidavit handed to you by

(Testimony of Mrs. Helen Fuller.)

Mr. Afook, that was last Tuesday, you remember that? A. Yes. [107]

Q. There was someone else present at that time, is that right? A. Yes.

Q. What was his name?

A. I don't know his name.

Q. Was he introduced to you? A. No.

Q. Did he have anything to say? A. No.

Q. Was it Philip Hirano? A. Yes.

Q. How do you know it was Philip Hirano?

A. Because I saw his name written underneath my name.

Mr. Peters: Was that a notary public or something like that? Was he signing as a notary or a witness?

Q. You didn't raise your right hand and take an oath when you signed that? A. No.

Q. Now, did you sign the statement the same day that Mr. Hirano did?

A. I beg your pardon?

Q. Did you sign the statement the same day that he did?

A. I don't know. I don't believe he signed his name the same day.

Q. He signed it the next day, is that right?

A. I don't know.

Q. In any event you only saw him once, is that right? A. Twice. [108]

Q. Hirano? A. Yes.

Q. Was he there the first time that Afook was present? A. Yes.

(Testimony of Mrs. Helen Fuller.)

Q. Then he came the following day, is that correct? A. I think it was the following day.

Q. Did he have any papers with him, Hirano, at the time? A. No.

Q. Was he taking any notes? Did he have a pencil with him? A. Yes, that's right.

Q. He had a pencil with him? A. Yes.

Q. And he was writing it all down?

A. I don't know if he was writing things down.

Q. You didn't see him write anything?

A. No.

Q. Now, you told Mr. Afook that you had already given a statement to the FBI, did you not?

A. Yes.

Q. Did he tell you that he had that statement? Did he say he knew that? A. No.

Q. Did he know it?

A. I don't know if he knew it.

Q. Did you give him the same statement that you gave to the FBI?

A. The same thing. [109]

Q. Word for word? A. Yes.

Q. You are sure of that? A. I am sure.

Q. I believe you stated that you gave the statement to the FBI shortly after the matter of this affidavit appeared in the Honolulu newspapers, is that right? A. Yes.

Q. And at that time you signed a statement?

A. No, I didn't sign no statement.

Q. You didn't sign anything at that time?

A. No.

(Testimony of Mrs. Helen Fuller.)

Q. How many times did you say the FBI visited you? A. I don't know how many times.

Q. A good many times, though, wasn't it?

A. Yes.

Q. Did they come back and read you a statement that they had prepared? A. No.

Q. At no time, and at no time did you ever sign a statement? A. Yes.

Q. Well, your answer is that you never signed a statement for the FBI, is that right?

A. No.

Q. You did sign, or you didn't sign? [110]

A. I don't remember signing. I believe I didn't sign.

Q. Anyhow that was shortly after your husband went to the hospital, wasn't that so? A. Yes.

Q. Did you visit your husband at the hospital?

A. Yes.

Q. At the Queen's? A. Yes.

Q. And at Kaneohe? A. Yes.

Q. Did the FBI have guards there?

Mr. Barlow: I object to that as being immaterial and irrelevant.

Chairman Pratt: Sustained.

Mr. Anthony: No further questions.

(Testimony of Mrs. Helen Fuller.)

Redirect Examination

By Mr. Barlow:

Q. Mrs. Fuller, Mr. Anthony asked you a question to the effect that—I am trying to quote him—was your husband mentally alert during the Smith Act trial, and you said no. Do you understand what Mr. Anthony said?

A. I don't exactly understand what he meant.

Q. Do you know what "mentally alert" means?

A. No, I don't.

Q. Then do you wish to withdraw your answer now? A. Yes.

Mr. Barlow: No further questions.

Mr. Anthony: Before the witness is excused, I [111] request counsel to produce, if he has it in his possession the FBI report to which the witness has testified, the statement.

Mr. Barlow: May I ask, for clarification again? I thought the witness said that she did not sign any statement for the FBI.

Mr. Anthony: That has nothing to do with the request.

(Discussion between counsel and the Committee regarding Mr. Anthony's request.)

(Testimony of Mrs. Helen Fuller.)

Examination

By Mr. Cades:

Q. Mrs. Fuller, a question was asked you going back to the day of the verdict, and your evidence was that day he was all right and that afterwards he was afraid to leave the house, and then he got worse. Then he turned from worse to worse. Do you know why he was afraid to leave the house?

A. I don't know.

Q. You don't know? A. I don't know.

Mr. Cades: That's all.

Examination

By Mr. Dodge:

Q. On that day of the verdict when, as you state, your husband was all right and not sick, did he discuss the case with you at all, the Smith Act case? A. No. [112]

Q. He didn't make any comment at all about it?

A. No.

Mr. Dodge: That's all.

Examination

By Mr. Peters:

Q. Mrs. Fuller, you told Mr. Barlow that you didn't understand what was meant by the expression "mentally alert"? A. Yes.

Q. Supposing I were to tell you that you, as you are sitting here as a witness, appear to me to

(Testimony of Mrs. Helen Fuller.)

be mentally alert, you know what is going on, you understand the questions that are propounded to you, when you are doubtful you think and then do the best you can, and you are conducting yourself here as a person that is mentally alert to the extent that your mentality goes. Now some people are very bright. I can name some people here today that are very bright, and then I could point to myself as a person that is rather stupid, and you may not be as bright as this bright person, and perhaps you are just as stupid or stupider than I am, but we are still mentally alert. Now, during the progress of the Smith trial while your husband was going every day performing his duties as a juror, did he appear around the household to be mentally alert, know what was going on, talk to you, go through the usual activities of domestic life? Did he do that?

A. Yes. [113]

Mr. Peters: That's all.

Examination

By Chairman Pratt:

Q. Mrs. Fuller, after your husband had been in the Queen's you said he went to Kaneohe?

A. Yes.

Q. At whose suggestion did he go over there?

A. That was mine, because we couldn't afford to pay the hospital.

Q. So it was a matter partially of expense, you wanted to save the expense? A. Yes.

(Testimony of Mrs. Helen Fuller.)

Q. While he was in the Queen's was he violent?

A. I didn't visit him the first day he went there. I think I went there on the 9th, the 9th of July.

Q. How long was he in the Queen's?

A. Oh, almost two months. He was taken to Kaneohe Hospital on August the 6th.

Chairman Pratt: Mr. Anthony, is it your thought that you would rather have a recess now to see if Mr. Barlow could get that statement?

Mr. Anthony: Yes, I would like to get that statement.

Chairman Pratt: We will take a recess at this time and see if it can be produced.

(Recess.)

Q. (By Mr. Anthony): Mrs. Fuller, do you still persist in your testimony that you signed no statement for the FBI? [114]

A. I'm not sure.

Q. You told me before that you didn't sign one. You remember that, don't you?

Mr. Barlow: Just a minute, please. Don't answer that unless the Committee directs you to. That is argumentative. The last statement that this witness made was to the effect that she wasn't sure whether she signed the statement or not, and that is a misstatement of the testimony.

Chairman Pratt: I think Mr. Barlow is correct, but I still think counsel is entitled to ask a question to try and clarify it.

(Argument by counsel on objection.)

(Testimony of Mrs. Helen Fuller.)

Q. (By Mr. Anthony): You still want to persist in your statement that you never signed the statement given to the FBI, or do you want to change that?

Mr. Barlow: Your Honor, I object to the form of the question. That is a misstatement of the evidence.

Chairman Pratt: I think, Mr. Anthony, perhaps the word "persist" is not quite in keeping with the situation, because she answered both ways.

Mr. Anthony: Very well, I will reframe it.

Q. (By Mr. Anthony): You remember telling me a little while ago that you never signed a statement to the FBI, do you not?

A. I believe I did, didn't I?

Q. You don't remember saying it? [115]

A. I don't remember.

Q. Now, did you or did you not sign a statement for the FBI?

A. I'm not sure whether I signed it or not.

Q. Wouldn't you know if the FBI brought you a sheaf of papers out to your home and asked you to sign it? Wouldn't you remember?

A. Well, that being so long, I'm not sure.

Q. Well, it has been a long time since you had this conversation with Mrs. Bouslog, too hasn't it?

A. Yes.

Q. You remember what you said to Mrs. Bouslog, don't you? A. Yes.

Q. And you don't remember what happened when the FBI came out to see you several weeks

(Testimony of Mrs. Helen Fuller.)

later? A. About what?

Q. About whether or not they had a piece of paper and asked you to sign it. A. No.

Q. They didn't do that? A. No.

Q. You are sure of that? A. Yes.

Q. Did you ever tell the FBI that your husband in the course of his mumblings said that this was a frame-up, this case? A. No.

Q. You never told them that?

A. No. [116]

Q. And your husband never said that?

A. No.

Q. Not even once? A. Yes.

Q. Your husband never once mumbled the word "frame-up"? A. No.

Q. You are positive of that?

A. I am positive.

Q. If he had said anything like that, you would remember it, wouldn't you? A. Yes.

Q. You are also positive that you never told the FBI that your husband mumbled "frame-up"?

A. No.

Q. Mrs. Fuller, I hand you a statement of Mrs. David P. Fuller, Jr., dated Honolulu, T. H., July 24, 1953, and call your attention to the last page of it. You read, do you not, Mrs. Fuller?

A. Yes

Q. Mrs. David P. Fuller, Jr., that is your name?

A. Yes.

Q. Does that cause you to change your testimony whether or not you ever signed a statement

(Testimony of Mrs. Helen Fuller.)

for the FBI? A. I'm still not sure.

Q. You remember an FBI agent named Irving T. Weeks? A. Yes.

Q. He came and visited you, did he not?

A. Yes. [117]

Q. On a number of occasions? A. Yes.

Q. And on one occasion he brought you the original of this document? A. Yes.

Q. I have in my hand? A. Yes.

Q. And he asked you to sign it?

A. I'm not sure.

Q. This, for your information, Mrs. Fuller, this is a carbon copy of a statement which you actually signed, and it has been handed to me by Mr. Barlow.

Mr. Barlow: Just a minute. May I bring to the Committee's attention that that statement is without basis in fact. There is no evidence to that effect by anybody.

(Argument by counsel.)

Mr. Anthony: I will reframe the question.

Q. (By Mr. Anthony): Having looked at this piece of paper you now recall, do you not, that you signed a statement in the presence of FBI agent Weeks? A. I'm still not sure.

Q. He had a piece of paper with him the last time he saw you, isn't that right. A. Yes.

Q. And he went over it with you, is that right?

A. Yes.

Q. But your recollection is that you don't know

(Testimony of Mrs. Helen Fuller.)

whether you signed the statement or not, is that your testimony? [118] A. I don't remember.

Mr. Barlow: May it please the Court, I object to the question as being repetitious. She has been asked and she has answered this thing, this is going on the sixth time. She has consistently said she doesn't remember signing it. I think it is repetitious.

Chairman Pratt: It has been asked and answered, Mr. Anthony.

Mr. Anthony: I ask counsel to stipulate that the document which he handed me emanating from the files of the Federal Bureau of Investigation is a true copy of the original executed by the witness on the stand.

Mr. Barlow: I don't know whether it is or not.

(Argument by counsel.)

Mr. Anthony: I will withdraw the request. I was just trying to expedite the matter.

Mr. Barlow: May it please the Committee, if the Committee wants me to do it, I will call the FBI.

Mr. Anthony: I will withdraw my request.

Q. (By Mr. Anthony): As I understand you now, Mrs. Fuller, you deny that your husband ever at any time said that that case was a frame-up, the Smith Act case? A. Yes.

Q. You also deny that you told that to the FBI?

A. Yes.

Q. Did anybody say that it was a frame-up?

A. Ellen said that. [119]

Mr. Peters: Who said it?

(Testimony of Mrs. Helen Fuller.)

A. Ellen Cabreros.

Q. Didn't you tell the FBI that both Ellen and your husband said that? A. No.

Q. Did you make this statement to the FBI, "Ellen kept saying they knew it was a frame-up. Once my husband mumbled the word 'frame-up,' but he was merely repeating what they were trying to get him to say"? A. Yes.

Q. Then your husband did mumble the word "frame-up."

A. He didn't say the word "frame-up."

Q. I just read to you what you told the FBI. Is that true or false?

A. My husband didn't say "frame-up" at no time.

Q. Let me read it to you once more. This is what you told the FBI agent Weeks on July 24, 1953, in what purports to be a statement signed by you: "Ellen kept saying that they knew it was a frame-up. Once my husband mumbled the word 'frame-up.'" Did you tell the FBI that?

A. I don't remember saying that.

Q. Well, do you still insist that your husband never used the word "frame-up"? A. Yes.

Q. And so therefore you deny ever having told that to the FBI? A. Yes. [120]

Mr. Anthony: No further questions.

Mr. Barlow: I have no further questions.

Chairman Pratt: That's all, Mrs. Fuller, you are excused.

(Witness excused.)

Mr. Anthony: The statement which I read to the witness was from the FBI report of July 24th, Statement of Mrs. David P. Fuller, Jr., dated July 24, 1953, which commences with the statement, "I, Mrs. Helen Fuller, wife of David P. Fuller, Jr., 1734 Colburn, Honolulu, make the following free and voluntary statement to Irving P. Weeks whom I know to be a Special Agent of the Federal Bureau of Investigation." On page 14 appears the following:

"Ellen kept saying that they knew it was a frame-up. Once my husband mumbled the word 'frameup,' but he was merely repeating what they were trying to get him to say."

Mr. Barlow: May I also ask the permission of the Committee to introduce the whole paragraph, because I feel in all fairness to the Committee that the entire paragraph be put in and not just one isolated sentence?

(Argument by counsel.)

Mr. Peters: I think the entire paragraph.

Chairman Pratt: Perhaps a copy could be made of it and put in the record, and we will mark it Petitioners' Exhibit Three.

Mr. Anthony: I don't know whether it appeared from my offer of impeaching evidence, on the last page [121] it says, "I have read the foregoing statement consisting of 12 pages and the same is true and correct to the best of my recollection. Mrs. David P. Fuller, Jr., witnessed by Irving T. Weeks, Special Agent of the FBI, Honolulu.

(Discussion between counsel and the Committee regarding numbering of the pages of the document referred to.)

MARVIS FULLER

called as a witness on behalf of the Petitioner, being first duly sworn, was examined and testified as follows:

Q. (By Mr. Pratt): What is your name?
A. Marvis Fuller.
Q. Will you speak up? A. Marvis Fuller.

Direct Examination

By Mr. Barlow:

Q. How old are you, Marvis? A. Fifteen.
Q. How far have you gone in school?
A. I am in the 10th grade now.
Q. Tenth grade. Do you remember Mrs. Bouslog coming out to see your father? A. Yes.
Q. Do you know approximately when that was?
A. I don't remember.
Q. You remember the Smith Act trial?
A. Yes. [122]
Q. Was it right after the Smith Act trial?
A. About one week after, something like that.
Q. You do remember her coming to see your father? A. Yes.
Q. Do you know whether your father sent for her or not, of your own knowledge, that is?
A. No.

(Testimony of Marvis Fuller.)

Q. Do you know whether Dr. Chang came to see your father at the same time Mrs. Bouslog was in your house? A. Yes.

Q. And while Dr. Chang examined or spoke with your father, Mrs. Bouslog was not in the room, is that right?

Mr. Anthony: Objected to as leading. Let's have the witness state what she observed.

Q. Where was Mrs. Bouslog when Dr. Chang was examining your father?

A. In the parlor.

Q. In the parlor. Now at any time did you go into the bedroom with Mrs. Bouslog and your father? A. Yes.

Q. Would you explain to the Committee approximately when Mrs. Bouslog got there that day, the first time she came?

A. It was in the afternoon.

Q. In the afternoon? A. Yes. [123]

Q. Did you go into the bedroom with Mrs. Bouslog when she went in to speak to your father?

Mr. Anthony: I object to the leading. The witness hasn't said she went in there. She said she was in the parlor. The question should be what did Mrs. Bouslog do.

Chairman Pratt: Perhaps you better lay a little more groundwork, Mr. Barlow.

Q. (By Mr. Barlow): You do remember Mrs. Bouslog coming there in the afternoon, is that right? A. Yes.

Q. Tell the Committee exactly what happened

(Testimony of Marvis Fuller.)

from the minute that Mrs. Bouslog got there up until the time that she left, what she said, who she spoke to, where it was spoken, whether you heard anything, and just exactly what happened, to the best of your recollection.

A. First she came, and she went in the room.

Chairman Pratt: Speak up louder, please.

A. She came and she went in.

Chairman Pratt: Maybe you better dispose of that gum, Marvis.

The Witness: I don't have any gum.

Chairman Pratt: Try to speak up as loudly as you can. I thought you had something in your mouth. I'm sorry, I don't want you to take offense, Marvis. I was just trying to get so everybody can hear. We didn't mean to bother you. It is near our recess time anyway. We will recess to one-thirty.

(Recess.) [124]

1:30 P.M. Session, Nov. 23, 1954.

Mr. Barlow: I have Dr. Chang outside.

CLARENCE CHANG

called as a witness on behalf of Petitioner, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Barlow:

Q. State your full name, please.

A. Dr. Clarence Chang.

(Testimony of Clarence Chang.)

Q. How old are you, doctor?

A. Forty-one.

Q. How long have you been practicing medicine?

A. Oh, approximately 12 years.

Mr. Barlow: Would counsel stipulate to the doctor's qualifications without anything further?

Mr. Anthony: Yes, we so stipulate.

Q. Doctor, did you have occasion to visit a David Fuller in 1953? A. Yes, sir.

Q. Are you the family doctor for the Fullers?

A. Yes, sir.

Q. Were you in the year 1953?

A. Pardon?

Q. Were you the Fuller family doctor in 1953?

A. Yes, I have been since 1948 or prior to that time.

Q. On Friday, June 26, 1953, did you have occasion to visit Mr. Fuller, David Fuller? [125]

A. That was June 26, 1953?

Q. Yes.

A. I was called to their residence, yes.

Q. Could you explain to the Committee what you found when you got there?

A. I had anticipated finding a person that was physically ill. When I got there I sat down by his bedside and said, "Hello, Mr. Fuller, how are you today?" He couldn't recognize me at all. He made no answers at that particular time. Then I asked him the usual question which all physicians would, as to what was wrong with him. There was no answer coming from him, and after saying a few

(Testimony of Clarence Chang.)

words to him on various other things I decided then that it was one of those problems where I wasn't going to get any verbal statement from him as to what was actually ailing him at that particular time. So in view of that fact I then proceeded to do a casual physical examination on him. At that time there were several other people in the room with him, and I asked them to leave the room so I could do a physical examination on the fellow. So in doing the physical examination the regular procedures were done, checking his head, his chest and his abdomen, and he made no movements of any kind.

When he was asked to move his leg he just looked at me, didn't know what I was talking about, either the right side or the left side, and when he was asked to [126] move his right arm or right leg, he didn't do any of those procedures. So it dawned on me that probably the trouble with him was more a mental type of problem rather than a physical illness.

Then I proceeded to ask him some various standard questions which general practitioners like myself or even a psychiatrist would ask him, to move his right leg, but he did not move it at all, so I grabbed hold of it and squeezed it once. Then he finally made a jerking movement of the leg. The same procedure was done on his left leg, right arm and the left arm. He moved only when he had some physical motion on him.

Then he was asked the question as to who I was.

(Testimony of Clarence Chang.).

He didn't know who I was at all, and I asked him what day it was. He didn't say a word at first, and finally after being asked one or two more times, I don't remember how many, then he finally said that it was Mother's Day. Then it gave me the conclusion that in view of the fact that he was not running any temperature at all and I couldn't find any physical findings of any form of illness on him, and in view of the fact that he couldn't recognize me although I have known him for a period of five, six or more years as family physician, and the fact that he couldn't move his arms or legs when he was requested to do so, and also the fact that he didn't even know what day it was, that he was [127] actually disoriented and his troubles were more mental than physical.

Q. Do you recognize Mrs. Bouslog as being one of the people present when you went to the house, or was present at any time that you were there?

A. Well, I saw some Caucasion woman in there. It was just a momentary glance, and I couldn't swear to it, although as I say there was a Caucasion woman, and the rest of them around the house, they were all Hawaiian or part Hawaiian.

Mr. Barlow: No further questions.

Mr. Anthony: No questions.

Chairman Pratt: You are excused, doctor, thank you.

(Witness excused.)

JOHN G. LYNN

called as a witness by the Petitioner, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Barlow:

Q. Will you please state your name?

A. John G. Lynn.

Q. How long have you been a doctor?

A. Since 1929.

Q. Do you have any specialty?

A. Psychiatry.

Q. How long have you specialized in [128] psychiatry?

A. I got my American Board certification as a specialist in 1940 or 1941, let me see.

Mr. Barlow: Will Mr. Anthony concede the doctor's qualifications as a specialist?

Mr. Anthony: We do.

Q. Doctor, did you have occasion to examine a David Fuller? A. I did.

Q. On what date did you first see David Fuller?

A. The evening of July the first. Let's see, that was last year, wasn't it? 1953, that's right.

Q. Would you explain to the Committee what David Fuller's condition was when you first met him, and what his condition was while you were examining him, and the results of your examination?

A. I have an actual description on him written up at the time I saw him showing everything I saw,

(Testimony of John G. Lynn.)

and I can read about a page, if you would like to see it. I will give it verbatim if you want it.

Q. We would like to have it verbatim.

A. He was lying on the bed in the bedroom in a dazed way, looking at the ceiling, mumbling and muttering to himself. Occasion he burst into song, and with a Bible in his hand or lying beside him, it was with some difficulty I was able to distract him and get his attention to carry on some kind of examination. I had a secretary with me. She took notes on everything that happened [129] while I examined him. He looked at me finally after stopping his communion with God long enough to do it and called mé Damon. He says, "Damon, yes, Damon."

Then I introduced myself, and later on he again apparently couldn't accept the introduction and called me Damon. He thought apparently I was Mr. Damon of the Damon family here.

He was somewhat disoriented, wasn't quite sure of the date, although he knew he was home. He was also occasionally distracted while I talked to him by noises from the outside, and with a frightened look he finally was able to tell me that he was being threatened, and I asked him how, and it was very long before he answered. Then he said by phone, they were calling upon the phone and bothering him. He also apparently heard voices in the air when I was talking to him. He said that they were saying, quote "Keep your mouth shut" unquote.

Now there are a lot more details in this examination, but these serve as a sufficient sampling to in-

(Testimony of John G. Lynn.)

dicate that he was mentally disturbed. It is available here if you want it in the written record as statistics.

Q. Did he at any time during your interview or examination, whatever it was, indicate any conversations that he had had with his sister?

A. That night you mean?

Q. Yes, on that night. Well, let's confine it to that [130] night. Does that about give us the gist of what went on that first examination?

A. I think so. I am not sure whether he indicated his sister talked to him that night or not or indicated whether she talked to him beforehand. I know subsequently he did and was apparently much upset by the conversations he had with her.

Q. You may refresh your recollection.

A. I can check on that, sir. There was a lot more pathological material which I don't think it would be necessary unless you wanted. He thought he was going to be castrated and a lot of things as a part of the psychiatric picture he presented.

Q. As a result of your first examination and visit did you form any opinion as to Mr. Fuller's condition? A. I did.

Q. What was it?

A. He was suffering an acute psychotic episode, definitely insane, both shall we say medically and legally. I considered him to be incompetent to carry on his own affairs.

Q. Could you from your examination of Mr.

(Testimony of John G. Lynn.)

Fuller conclude as to what brought about this condition?

A. Well, that could only be inferred from the historical material which I got from his wife and from Dr. Chang, I think the family physician, or which came from Dr. Chang. I got it second-hand. The doctor got it from [131] his wife first-hand, and also from the patient himself subsequently during examination in the hospital when he tended to improve somewhat and was able to give a much more coherent account of what happened.

It apparently came on as an acute episode right after the end of the trial, that is the Hawaiian Seven trial. I think it was early in the morning his wife was awakened by him. The trial ended June 26th, I believe, and the patient——

Q. The trial, just to be correct, the verdict came in, I think, on the 20th.

A. Well, the way we got the material is that he became suddenly ill. I will check and be sure about it. Here we are. When did it end, on what date? I have it here that he was sick, according to the observations of both the wife and the family, his son was also in on this and he verified it also. I neglected to mention him, as well as Dr. Clarence Chang, since early on the morning of Saturday, June 20th.

Q. 1953?

A. That's correct, 1953. The fact that this occurred as a sequel to the closing of the very trying and strenuous days of the trial would, on the basis

(Testimony of John G. Lynn.)

of psychiatric precedent, not be too surprising, because it is quite common for an individual who is under great emotional strain to hold up during a crisis and then immediately with the termination of the pressurized situation to crack up. [132]

You see it lots of times in distressed families, they hold up during sickness and during the critical period and immediately when the crisis is over they will go to pieces. If it isn't in a psychotic episode, maybe emotional like a severe emotional build-up.

So the picture again was that he had had this sudden episode and it was characterized by praying, by calling on God, by singing songs, a situation that had occurred suddenly following the termination of the trial.

Having the picture that I got from examining him that night confirmed, because it was a type of psychotic reaction which is fairly characteristic, namely of an acute catatonic reaction which is notoriously a type of psychotic response which comes in acute episodes, as this obviously must have been.

Mr. Barlow: I have no further questions, doctor.

Cross-Examination

By Mr. Anthony:

Q. Doctor, you have your examination with you typed out? A. Yes.

Q. May I see it, please?

A. I think there was some examination made subsequently at the hospital. It doesn't cover only

(Testimony of John G. Lynn.)

the initial day; it covers the material made at the hospital subsequently. It is all pinned there together, although it was made subsequently.

Mr. Barlow: Does the Committee feel Mr. Anthony [133] should peruse the whole examination, or just that that the doctor testified to?

Chairman Pratt: It doesn't seem to me that his examination should be confined to the first report.

Q. (By Mr. Anthony): This report that you have handeed me dated July 2, 1953, entitled Record of Emergency Psychiatric Evaluation and Disposition of David Fuller, were you requested to make this examination? A. I was.

Q. By Mr. Barlow?

A. Mr. Barlow, that's right.

Q. So you went out there at the request of the United States Attorney? A. Yes.

Q. And you made that for him in connection with his report to the Court, is that right?

A. I don't think he mentioned what connection, except that the man was sick and he was a juror and it had to be determined as to how sick he was and what needed to be done, and apparently he felt, Mr. Barlow felt he should assume responsibility for seeing that he got the right type of psychiatric help.

Q. After you completed your examination, you delivered copies of your interview to Mr. Barlow, did you?

A. I think they were sent to you, weren't they? I don't remember whether they were or not; as a matter of [134] fact, not until sometime later, but I

(Testimony of John G. Lynn.)

think I sent copies to you. Did I send some report to you? I frankly don't remember whether I did or not. I just don't remember whether that was mailed to you or not.

Q. Wouldn't you know? Wouldn't you have any way of finding out?

A. I would get a release from the patient before it could be done.

Q. How could you get a release from this patient?

A. Well, I got a release for the paper. The release is attached here.

Mr. Barlow: I might state for the benefit——

Mr. Anthony: I would like to conduct my own examination.

Mr. Barlow: May I address the committee?

Chairman Pratt: Very well, Mr. Barlow. You mean concerning this report?

Mr. Barlow: Yes, I might state for the benefit of the Chairman and Mr. Anthony that Mr. Fuller has signed a release authorizing Dr. Lynn to testify to anything and everything within his knowledge insofar as it pertains to this case.

Mr. Anthony: Have you got that release with you?

Mr. Barlow: If the Committee feels it should be filed, here it is.

The Witness: I thought I had a copy of it here.

Mr. Anthony: May I see it, please? [135]

The Witness: This is the authorization for treatment.

(Testimony of John G. Lynn.)

Mr. Anthony: May I see it, please?

The Witness: Here is a future release paper.

Q. (By Mr. Anthony): This first document that you have handed me, consent to the disclosure of privileged information, signed by David P. Fuller, Jr., dated July 15, 1953, is that in his handwriting?

A. Well, I wasn't there as a witness. I merely—I couldn't tell you if it wasn't. We have two witnesses there on the bottom who got the permit and release, and I assume that it was in his handwriting, because they witnessed his signature.

Q. You were employed by Mr. Barlow to make this examination, is that right?

A. That's right.

Q. Did you bill him for your services?

A. I billed him for the services. I won't go into the details of that. Yes, I did.

Q. What were the details?

A. Well, only that he thought in good faith that the United States Government would back up the cost of all the specialized examinations that were required, and because of a technical reason of some kind they weren't able to do it.

Q. Did you ever get paid?

A. Well, since actually it had to come out of his pocket, we compromised and took a nominal fee to cover [136] just the cost of my time on the case, which covered over a month's treatment.

Q. What was the nominal fee?

A. I think it came out of his own pocket, if I

(Testimony of John G. Lynn.)

am not mistaken, eventually because he had kind of committed himself for the Government and then the Government didn't come through.

Q. The question is——

A. The total amount which I billed him for which covered all the treatments as well as the examination while he was about a month in the hospital, over a month and a half almost, were $760.00. He had electric shock as well as examinations, and I saw him every day. I think we settled for, I forgot, I think somewhere around $250.00 or $300.00, wasn't it?

Q. Have you got your record there?

A. I haven't got the record how much he paid me, no, only what I have told you. I don't happen to know how much he paid, except we settled on just enough to cover nominal expenses.

Q. As a matter of fact, doctor, you never were employed as the physician of David Fuller, were you?

A. You mean by David himself? He was too sick to employ anybody.

Q. Did any member of his family employ you?

A. His wife definitely called me up and talked to me about him and also indicated that she wanted me to take [137] care of him as a patient so that he could get well from his illness.

Mr. Anthony: Will you read the question, please?

(The question was read by the reporter.)

(Testimony of John G. Lynn.)

A. If you mean pay me, no.

Q. Engage your professional services.

A. When I arrived there that night, I am trying to find out what you mean. His wife indicated that she wanted me to give him treatment and wanted me to see that he got the treatment that he required. Whether you want to interpret that as engaging me from her point of view as well as being engaged from Mr. Barlow's point of view, that is up to you. That is what happened.

Q. But you went out there acting under the direct employment of Mr. Barlow?

A. That is correct.

Q. Now had you had any discussion with any FBI agents before you went out there?

A. No.

Q. Subsequently did you?

A. Subsequently, yes.

Q. You gave him shock treatment, you say?

A. That's right, insulin and electric shock.

Q. Was he diabetic?

A. The blood sugar wasn't densified enough to make any difference. We took routine sugars on him.

Q. Where did you give him the shock [138] treatment?

A. Queen's Hospital Mental Health Unit.

Q. Do you keep a card on your patients?

A. You mean, what do you mean by a card?

Q. Physicians card?

(Testimony of John G. Lynn.)

A. I still don't understand what you mean by physician's card.

Q. Most ordinary doctors, apart from psychiatrists.

A. I may be an ordinary doctor; would you define so I know what you are talking about? We keep cards on our bills; we keep cards on our visits.

Q. Most doctors keep cards in their own handwriting or in the handwriting of somebody in their office which indicates the visits and treatment that has been administered to patients. Do you keep any such record? A. I do.

Q. Do you have that with you?

A. The card is not here. We have a copy of the card which was forwarded as a bill to Mr. Barlow. Do you want to see that?

Q. Yes, do you have it there?

A. Right here. The original card is in the files at the office.

Q. This just has to do with the economics of your treatment, namely, the real charges. Do you have anything that has to do with the professional end of the treatment?

A. That is a part of the hospital record. It has a [139] daily record of the treatment every day in detail.

Q. On the chart?

A. On the chart, because he received it in the hospital as a patient.

Q. You keep no record yourself, is that right?

A. No, I only have the hospital record, because

(Testimony of John G. Lynn.)

it serves both my office and the hospital records simultaneously.

Q. You don't actually have the hospital record. You mean you have access to it?

A. That's right. Now there is one more point. I have a record here of some examinations in the hospital which were in great detail which are also in the hospital record.

Q. May I see those, please?

Mr. Barlow: Just a minute, doctor, before you comply with that request. May it please the Chairman and Members of the Committee, I object to Mr. Anthony going into this aspect and phase of the situation because it is wholly and totally irrelevant. It is beyond the scope of the direct examination. I asked Dr. Lynn about the first visit that he made, his analysis and treatment and what his conclusions were about the first visit. When Mr. Anthony was given all the data on all the visits I objected to that, and I object to Mr. Anthony going beyond the scope of the direct examination in this case.

(Argument by counsel on objection.)

Q. (By Mr. Takahashi): Doctor, in stating your opinion [140] did you take into consideration the subsequent examinations? Did you form your conclusion to begin with on the first examination, or the conclusion is based on all examinations?

A. Well, the initial opinion was made and certainly could have been made on the basis of the initial examination only, because it was such a typical

(Testimony of John G. Lynn.)

psychotic picture, just like a broken leg is broken on the first examination. However, subsequent examination confirmed that.

(Further argument by counsel.)

Chairman Pratt: Any other questions of the Committee?

Mr. Dodge: I have one.

Q. (By Mr. Dodge): In the subsequent examinations did they have a tendency to confirm, I think you said confirm? A. It did.

Q. Did they offer an explanation of the cause of the episode or bring any light to bear on the first week, for example?

A. Well, I think they did.

Chairman Pratt: I think, Mr. Barlow, from the witness' statement that his subsequent examination does have a bearing on the condition of the patient at the time of his initial examination, and I think as long as long as we are not going to spend too much time on it we will proceed with the questioning.

Mr. Anthony: I could have been through with it [141] by now if the opposition hadn't interrupted.

Chairman Pratt: We will permit the question.

Q. (By Mr. Anthony): May I have the rest of your question and answer examination, doctor, in your file there? I have July 15, 1953 and July 2, 1953.

A. Well, here is the history, social service notes,

(Testimony of John G. Lynn.)

and so forth. That is a copy of the hospital record covering the same material.

Q. This is a report by your social worker, is that right?

A. Phychiatric Social Worker, that right. We interviewed Mrs. Fuller, I think, and Mr. Fuller's sister.

Mr. Barlow: Your Honor, I certainly object to Mr. Anthony seeing the report of the social worker that went out to Mrs. Fuller. It is irrelevant. It is hearsay, and I don't think the Committee is interested in it. It is just a fishing expedition. There ought to be a limit to this thing. We should stop some place.

Chairman Pratt: Let's see what he plans to do.

Mr. Barlow: I object to him looking at it.

(Argument by counsel on objection.)

Q. (By Mr. Anthony): Psychiatrists employ psychiatric social workers as a part of your regular business, is that right? A. That's right.

Q. And this one acts directly under your supervision and control? A. That's right. [142]

Mr. Barlow: That may be very well, but this is something outside Mrs. Fuller and the doctor.

Chairman Pratt: It seems to me, Mr. Anthony, we are getting a little far afield.

Mr. Anthony: I haven't asked a question about it yet.

(Further argument by counsel.)

(Testimony of John G. Lynn.)

Q. (By Mr. Anthony): Now doctor, is it the usual thing for you take a secretary with you to interrogate a witness?

A. No, it isn't the usual thing.

Q. That was done at the request of Mr. Barlow?

A. No, it wasn't done at his request. It was done at my own instigation because I realized that that was not only an ordinary mental illness case, but it was a case that would require medical legal implications, and any case like that I always take a secretary, too. I think I even asked Mr. Barlow if I could take my secretary and if they would pay for the secretary.

Q. What did he say to that?

A. He said certainly they would. He said he assumed the Government would do it, but again he was wrong, but he acted in perfectly good faith, no question about that.

Q. Would you say that the man was mentally ill at the time you saw him? A. He was.

Q. Definitely, very definitely?

A. Definitely. [143]

Q. Did he understand anything at all?

A. Well, with difficulty. I mean I would have to bring him out of it by repeating the question a number of times, and then he would answer, usually appropriately, sometimes in a half-dazed way, but answered questions.

Q. When you first went in there you had never been at this home before, had you?

A. No, I hadn't.

(Testimony of John G. Lynn.)

Q. What did you do when you first got in the door?

A. It's a little hard to remember in detail. I know I took off my hat and then I saw Mrs. Fuller, and I think their son was there.

Q. What was his name?

A. I don't remember his name.

Q. Did you make a note of it?

A. Unless it is recorded in my record there.

Q. You mean the record you have just handed me? A. I think so.

Q. You made a note of it there?

A. I think there is a note in the record there somewhere.

Q. Then after you took off your hat and looked at the son and Mrs. Fuller, then what did you do?

A. I sat down, and Mrs. Fuller was upset at the fact her husband was sick and told me about what had happened and how he had become sick suddenly, right after the trial, and hoped that something could be done to help him [144] and he could be cured. In other words, she with a good deal of feeling and disturbance as would be natural outlined what had happened, how he was behaving, and so I got something of the background story from her.

Q. Did she talk to you about how he was before the verdict was rendered?

A. I asked her about that specifically because it was important to know when it actually started, yes. She told me that there had been no evidence of any

(Testimony of John G. Lynn.)

type of disturbance or abnormality prior to this sudden onset.

Q. Did she tell you anything about what he said as to what went on in the course of the trial?

A. No, she didn't go into that at all. No, she didn't mention that.

Q. Then after you had this conference with Mrs. Fuller, that was in the parlor, was it?

A. That is correct.

Q. Then what did you do?

A. I went into the bedroom where he was lying stretched out on the beg gazing at the ceiling, in the company of my secretary and Mrs. Fuller who introduced me. It didn't seem to register with him so I again introduced myself. Then he addressed me—he finally looked at me and said, "Oh, Damon," apparently mistaking me for one of the members of the Damon family.

Q. You did not attach any significance to, the fact that he didn't recognize you, did you, doctor?

A. Yes. [145]

Q. He had never seen you before? A. No.

Q. Now you say that during the course of the interview he said that he heard voices?

A. Yes.

Q. Were there any voices at that time?

A. None saying "Keep your mouth shut."

Q. But there were voices?

A. He said that he heard voices.

Q. I am asking you whether you heard voices.

A. Not at the time he heard them, no.

(Testimony of John G. Lynn.)

Q. Did you ask him when he began to sit on the jury?

A. No, I did not ask him that question, not that I recall.

Q. Did you ask him how long he had been on the jury?

A. I don't remember asking that question either.

Q. Did you ask him who was the President of the United States? A. I did.

Q. What did he say?

A. I think he gave the right answer, if I remember correctly, but I will have to check to be sure.

Q. He said Eisenhower?

A. Eisenhower, that is correct.

Q. And without any hesitation?

A. That is correct.

Q. Did you ask him where he was employed?

A. I think I did, yes. [146]

Q. What was his answer?

A. I think he gave the correct answer.

Q. Castle and Cooke Terminals?

A. That's right.

Q. Did you ask him the name of his superiors, his bosses?

A. No, I don't remember asking that at all.

Q. Didn't he volunteer what their names were?

A. Well, you are really stretching my memory of every detail there. I don't think he did. You can read it for yourself.

Mr. Barlow: May it please the Chairman, I ob-

(Testimony of John G. Lynn.)

ject to Mr. Anthony consulting the statement, the official document of the doctor and cross-examining the doctor. The doctor hasn't testified on direct examination from that statement. There is no legal reason for Mr. Anthony to be in possession of that statement at this moment. We are going very far afield.

Mr. Peters: The fact remains he has got it.

Mr. Barlow: I have been raising the objection here for the last half hour. I think the Committee should make a ruling.

Chairman Pratt: I think myself, Mr. Anthony, that we have had about enough of that. We let you preliminarily go into it because it might tie in with his condition, but the extent of the doctor's examination would seem to be outside of the field of the direct examination.

Mr. Anthony: I will confine myself to [147] his condition then.

Q. (By Mr. Anthony): Do you recall asking him the question, "Your Boss?" Do you recall that?

A. No, I don't. I may have.

Q. Do you recall his answer, "Employment manager and cargo supervisor, Richardson and Jenson?" A. I don't happen to recall that.

Q. Take a look at it.

A. If it is down there he said it.

Q. So at least he knew, assuming that those people were his bosses, he knew what he was talking about on that occasion?

A. That's right.

(Testimony of John G. Lynn.)

Q. Do you recall asking him when he took up jury duty?

A. I don't remember asking that particular question, no.

Q. Well, the transcript discloses that you asked him this——

Mr. Barlow: Just a minute.

Chairman Pratt: I don't think that this can be part of the record. I agree with Mr. Barlow that this is outside the scope.

Mr. Peters: What is the purpose of this, Mr. Anthony?

Mr. Anthony: I want to find out.

Mr. Peters: Find out what?

Mr. Anthony: I want to find out the condition of this man.

Mr. Peters: Why don't you ask him if there is anything in that statement that is contradictory to what the [148] doctor testified?

Mr. Barlow: Why go over it. He hasn't testified to anything. That is precisely why I objected.

(Argument by counsel on objection.)

Mr. Anthony: We offer the statement in evidence, Mr. Chairman.

Mr. Barlow: There is no legal way for that statement to get in there.

Mr. Anthony: We offer it in evidence.

Mr. Barlow: I object to it on the ground that there hasn't been any proper foundation laid.

(Argument by counsel on objection.)

(Testimony of John G. Lynn.)

Chairman Pratt: I don't think it is admissible.

Mr. Peters: I don't think it has any place in this hearing at all.

(Further argument by counsel.)

Mr. Peters: Mr. Anthony, it seems to me that all of these matters could have been extracted from the witness on legitimate cross-examination. You could have asked him questions that would have brought out the fact that he knew where he was working and for whom. I would like you to ask the doctor as to whether or not any of these matters and things that you have called to his attention would change his opinion as to the mental condition of the patient, and then we will be through with him.

Q. (By Mr. Anthony): Doctor, the fact that he knew where [149] he was employed and how long he had served on the jury and the date that he had last worked and the names of his employers and the names of his bosses, would that have any bearing on your conclusion in this case?

A. No, it would not.

Q. You still would conclude that?

A. If I can amplify that, if you want me to, or simply no.

Q. You still would conclude that at that time he was suffering from an acute psychotic episode, is that right? A. That is correct.

Q. Now, Doctor, answers of that character, would they or would they not cause a layman to

(Testimony of John G. Lynn.)

believe that the man was suffering from mental illness of some character?

A. You mean answers of the kind that were essentially normal?

Q. Yes.

A. They would cause a layman, if they only had that without any further evidence, and didn't have the background to judge it, probably to assume that he might be normal, but that is not an evaluation that means anything.

Q. Because they are not schooled in that business?

A. Not only that, but they haven't got all the facts, because he was talking about hearing voices, and he was talking about being bothered, being threatened. He was having communications with God, and singing, and everything else; the whole pattern of behavior was, aside from his conversation was as typically a psychotic episode of a catatonic type as you get; that's all. [150]

Q. Did you get the impression that he was angry at that time?

A. No; I got the impression he was very frightened. He was very frightened. He said he was frightened, as a matter of fact.

Q. Didn't he say quite the reverse, Doctor? How about consulting your record here?

A. I think it would be a good idea.

Q. You asked the question, "You feel angry, mad, frightened? No."

A. Later on he says he has been threatened.

(Testimony of John G. Lynn.)

Mr. Peters: He said he wasn't frightened; the doctor says from everything he saw he was frightened. What are you going to do about it?

A. Here is where he says that he was, or the equivalent to it. He was listening to something, and apparently mumbled something as though he were hearing something, so I said, "Question: Is that strange, that noise?" I think there was a noise outside, too, that attracted his attention; there was an airplane going overhead at that point.

Q. Go back over that a little bit further. His answer was "Noise," wasn't it?

A. I will go back a little further. I said, "Has any——

Mr. Peters: What is the purpose of this?

A. "Has anything really strange happened?" He nodded his head. It was a definitely positive nod. I said, "Tell me about it. What has been happening?" "Answer: Can't [151] remember when or how long been in bed." I said, "Is that strange that you can't remember?" Then he made a funny noise in his throat.

Q. Is that what he said?

A. "Noise." Then I said, "Is that strange, that noise?" That's right. He said, "Noise." "Answer: That's right," and I said, "Is that strange, that noise?" There was an airplane going over at that point. I said, "What else strange has happened? Tell me about it." Then he mumbled something. Then, "Question: Do they mean something? Did somebody have reference to you? What do they mean to you?" There wasn't any answer. Then the

(Testimony of John G. Lynn.)

question again I asked him was, "What do they mean to you?" Then I said, "How are they tied up with you in some way?" And he replied, "They are." Then I asked again, "What has that got to do with you, those noises?" And then he said, "My life or somebody." Then I said, "Question: They try to take your life, is that what you said?" He replied, "Ah, trying to take my life." Then I said, "Question: Who had been trying to take your life, David," calling him by his first name, "Who had been trying to take your life, David? Any idea?" There was no answer.

Chairman Pratt: I wonder if we could interrupt. Mr. Anthony, do we have to have this whole thing read?

Mr. Anthony: This is the doctor's idea. You handed it to me.

Chairman Pratt: You asked him to read it. [152] I think we have gone quite far afield.

Mr. Anthony: I asked the doctor whether or not he was frightened, and he said yes.

Chairman Pratt: He could judge that, Mr. Anthony, from the man's appearance even in the absence of his saying anything. That was his answer, and I don't see the sense of reading all the record in here.

Mr. Anthony: I pointed to his own examination in which the witness told him he wasn't frightened.

Mr. Barlow: May it please the Chairman, these are the little things I would like to bring to the Committee's attention. Mr. Anthony asked the doctor did the patient appear frightened and the

(Testimony of John G. Lynn.)

doctor says no. Then Mr. Anthony gives him the statement showing where the man said he was.

Mr. Anthony: Just the reverse.

Mr. Barlow: Regardless whether it is the reverse, that is what he asked the doctor.

Q. (By Mr. Anthony): He wasn't frightened, was he?

Mr. Barlow: The leading question is improper because he was frightened.

Q. (By Mr. Anthony): He was frightened?

A. He was frightened. I could observe the processes, the fact that they were trying to kill him, even calling him on the phone, and also a voice was telling him to keep his mouth shut. His whole demeanor was of fear.

Chairman Pratt: I think, gentlemen, that [153] it is time to adjourn. I don't know whether Mr. Anthony was through with this witness or about through.

Mr. Anthony: Let me ask him a couple of more questions, if I may wind this up.

Q. Doctor, did you have an interview with Mr. Barlow after you had this first interview with the witness?

A. No, I never have had. I never have seen Mr. Barlow until today.

Q. Did you have an interview with the FBI that was had subsequent to your first interview with this patient? A. That's right.

Q. And prior to taking the statement of July 15, 1953?

(Testimony of John G. Lynn.)

A. Let me think a second here. I think this is the statement that was taken as a part of our examination in which the FBI man was there at the interview, or is it the one later? I'm not sure. There was an interview with myself and a social worker present only, and another interview in which myself and an FBI man were present.

Q. This yellow sheet, July 15, 1953, the FBI was present at that?

A. Let me just check. I am not quite sure about that. Too bad we haven't got it on the top sheet. I would have to check the hospital statement to make sure, but to the best of my memory—I just wouldn't want to be sure which one of the interviews it was.

Q. Do you have any other interview here?

A. Those are the only ones in which there were stenographic [154] notes taken.

Q. There was an FBI agent present when one of the stenographic records was taken?

A. That is correct.

Q. These are the only two stenographic records?

A. No, there is another one.

Q. Where is the other one?

A. I'm not sure. If it isn't there, it is in the hospital records. I have got four or five copies of each thing there, and it gets kind of fouled up.

Q. Now, directing your attention to the patient's release of July 15, 1953, what was his condition at that time?

Chairman Pratt: I think the committee is going to have to adjourn.

(Testimony of John G. Lynn.)

A. Well, he was still sick, but much better, because you see he had had insulin electric shock and he was improved and relatively free from all of the delusions and hallucinations that characterized him on the initial interview, because he had had the insulin shock therapy and was much improved.

Mr. Anthony: We would like to have this record marked for identification, consisting of the interview of July 2, 1953, the interview of July 15, 1953, the patient's release, dated July 15, 1953, and the file containing the report upon David Fuller.

Mr. Barlow: Is that into evidence or identification? [155]

Chairman Pratt: That is for identification.

Mr. Barlow: I have no basis for objection.

Chairman Pratt: We will mark them as Licensee's Exhibit A for identification.

(The documents referred to were marked Licensee's Exhibit A for identification.)

Mr. Anthony: I have no further questions.

Mr. Dodge: I have a question.

Examination

By Mr. Dodge:

Q. In such a state as this acute psychotic episode that you describe, would it be expected to find that the patient's remarks reflected whatever it was that caused the episode? Would that be a normal situation or abnormal?

A. Yes, it may. At the same time they can have

(Testimony of John G. Lynn.)

blockages, as there were in his case, at certain times because of fear, the reaction becomes so great when you are talking about the cause that he just won't say anything, and that has happened, but later on, when he was less acute in this interview, he brought out some material that was associated with the cause. That is after he got over the tremendous fear or acute episode, and subsequently in the hospital he was less burdened with the emotional intensity of fear and more able to talk free from that disturbing and blocking feeling, and then he brought out some of the causes apparently.

Q. If those blocks such as the fear you suggest were not present at intervals during the first week or so, would [156] it be expected that his remarks would have to do with the episode that caused this psychotic condition? A. That's right.

Examination

By Chairman Pratt:

Q. There would be no way for you to tell, Doctor, from your own examination, how long his condition was acute such as you found it on your first examination?

A. No, you couldn't tell exactly. You could only say it was formulating a very extreme behavior and it was only of short duration, but you couldn't say precisely, no.

Q. You couldn't say whether on June 26th he could have made a coherent statement?

(Testimony of John G. Lynn.)

A. Well, all I could say would be this, that accepting the statements of his wife, of his son and Dr. Chang, that this was an acute deviation and onset immediately after the trial and had been continuously operating since then along the pattern that I observed, and anything he said subsequent to the onset must have been contaminated by his illness, that's all, or more or less contaminated. Some statements can be okay, but certainly he was sick mentally. I don't know whether that answers your question or not.

Q. (By Mr. Dodge): There would be intervals of coherence?

A. There might be intervals of coherence, that is true, but it has to be all evaluated as being contaminated by his illness, but there can be moments of lucidity, that is true, but that is pretty hard to determine unless you [157] have got an expert there at the moment.

Mr. Dodge: That's all I have.

Chairman Pratt: Thank you, Doctor.

(Witness excused.)

Chairman Pratt: We will adjourn at this time and reconvene tomorrow morning at 9:00 o'clock.

(Adjournment.)

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VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 326

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST HARRIET BOUSLOG SAWYER, PETITIONER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 29, 1958
CERTIORARI GRANTED NOVEMBER 17, 1958

No. 15109

United States
Court of Appeals
for the Ninth Circuit

HARRIET BOUSLOG SAWYER,

Appellant,

vs.

BAR ASSOCIATION OF HAWAII,

Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 289 to 546)

Appeal from the Supreme Court for the Territory of Hawaii.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-8-56

November 24, 1954

(The parties being present, together with counsel, the hearing was resumed and proceedings were as follows.)

Chairman Pratt: I would like the record to show Mr. Barlow has handed the Chairman a certificate under date of November 23, 1954, signed by William F. Thompson, Jr., relative to the request that was made for an excerpt of the records as to the date of the indictment, and so forth, appearance of counsel for various defendants, two copies of which have been handed to counsel for the Licensee. This will be placed in the file. Do you have any objection to any part of it, Mr. Anthony?

Mr. Anthony: No. I was just wondering why does the Clerk have November 5th, Mr. Barlow?

Mr. Barlow: I frankly haven't read it.

Mr. Anthony: Was that the date of the appeal or something? [158]

Mr. Barlow: I haven't read the certificate. May I make a statement? The other day the matter came up about the original notes of Mr. Matsuoka. I called Mr. Piper and Mr. Piper indicated that the FBI did not have any knowledge at all about his original notes. I then called a Mr. Blickhahn or Blickman—I don't know his true name, but he is the manager of the newspaper, the Hilo Herald-Tribune. I spoke with him on the telephone and he said that he did not have the original notes, that the only notes he remembered were the typewrit-

ten notes. I wanted to make that report to the Committee.

Mr. Dodge: You said Piper indicated?

Mr. Barlow: Maybe that is not a proper choice of words. He told me that he didn't have them. He just made a flat statement.

Chairman Pratt: Mr. Anthony, the Committee had agreed to subpoena the agent in charge. I happened to hear on the radio this morning that Mr. Piper is departing for the mainland tonight. Under the circumstances does counsel still want to have him subpoenaed?

Mr. Anthony: No, based on that representation we will assume that the notes are not available.

Chairman Pratt: I understand you to admit that if these people were called they would so testify.

Mr. Anthony: Yes.

Mr. Barlow: As an officer of the Court and former [159] United States Attorney I can state I have never seen the original of the notes.

Chairman Pratt: Will you then proceed with the examination? The witness has already been sworn.

MARVIS FULLER

recalled as a witness on behalf of Petitioner, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Barlow:

Q. Would you state your name?

A. Marvis Fuller.

Q. How old are you?

A. Fifteen years old.

Q. How far have you gone in school?

A. I am in the 10th grade now.

Q. You live where?

A. 1734 Colburn Street.

Q. Do you know Mrs. Bouslog? A. Yes.

Q. Do you see her here? A. Yes.

Q. Where is she?

A. (Pointing toward Mrs. Bouslog.)

Q. Do you remember the Smith Act trial?

A. Yes.

Q. Do you remember your father served on the Smith Act trial as a juror? A. Yes. [160]

Q. Do you remember right after the verdict in the Smith Act trial whether Mrs. Bouslog came to your house? A. Yes.

Q. Would you tell the Committee what Mrs. Bouslog said and what was said and who was present, if you remember? A. What?

Q. What happened when Mrs. Bouslog came in there?

Mr. Peters: That's quite a load for a child of

this age. Why don't you break down that question and lay the foundation, where they were and who were present and who did the talking.

Mr. Barlow: May it please the Committee, I was going to ask the Committee whether they were going to adhere to the strict rules of evidence insofar as the young girl is concerned. I don't want to lead her.

Mr. Peters: It isn't a matter of evidence. It is just breaking down the questions. You needn't lead her. Let's get who was there and what day it was.

Q. (By Mr. Barlow): Do you remember what day it was of the week? A. No.

Q. Do you remember what persons were present?

A. Mrs. Bouslog and my Auntie Ellen and Grace.

Q. Grace who? A. Oshiro.

Q. Who else? Were you there?

A. Yes, and my mother and father. [161]

Q. Your mother and father. Do you remember what time of day it was? Was it morning, afternoon or night? A. Afternoon.

Q. Afternoon. Now that is the first time that Mrs. Bouslog came, is that right? A. Yes.

Q. All right now, what did Mrs. Bouslog say in your presence and in the presence of your father, and in the presence of the other people if they were all there?

A. I don't know. I don't remember.

Q. Well, do you remember Mrs. Bouslog saying

(Testimony of Marvis Fuller.)

anything to your mother? A. When?

Q. This first meeting when everybody was there.

A. I don't know.

Q. Do you remember any part of the conversation at all? A. No.

Q. Do you remember your mother saying anything to Mrs. Bouslog? A. No.

Q. Do you remember Mrs. Bouslog saying anything to your mother? A. No.

Q. Now did Mrs. Bouslog come back again?

A. Yes.

Q. And when was that?

A. I don't know. [162]

Q. Was it a day or two later?

A. I think the next day.

Q. Who was there? Who was present, what people?

A. Mrs. Bouslog, my Auntie Ellen and Grace Oshiro and me and my mother.

Q. Did Mrs. Bouslog come with anybody, or did she come alone on this occasion?

A. I don't know.

Q. Do you remember any conversation that Mrs. Bouslog had with anybody in the room?

A. No.

Q. Do you remember whether your father said anything to Mrs. Bouslog? A. No.

Q. Do you remember whether Mrs. Bouslog said anything to your father? A. No.

Q. Do you remember being interviewed by the FBI? A. Yes.

(Testimony of Marvis Fuller.)

Q. Do you remember making a statement to the FBI? A. Yes.

Q. Do you remember being interviewed by Mr. Afook? A. Yes.

Q. Do you remember making a statement to Mr. Afook? A. Yes.

Q. Would you say that the statements that you made to the FBI and Mr. Afook were the truth?

A. Yes. [163]

Q. And it represented the happenings as they occurred at the time? A. Yes.

Q. Did you tell a lie to the FBI? A. No.

Q. Did you lie to Mr. Afook? A. No.

Q. You told him the truth? A. Yes.

Q. Marvis, is this your signature?

A. Yes.

Q. Did Mr. Afook talk to you the other day?

A. Yes.

Q. Do you remember November 16th?

A. Yes.

Q. Now everything that happened, did you tell Mr. Afook about it? A. Yes.

Q. And what is contained in here the truth?

A. Yes.

Q. Everything? A. Yes.

Q. Did you read it?

A. Yes, a couple of days ago.

Q. A couple of days ago you read it?

A. Yes.

Q. And you haven't read it since? [164]

A. Yes.

(Testimony of Marvis Fuller.)

Q. And everything it said in here was the truth?

A. Yes.

Mr. Barlow: I would like to offer this statement in evidence, if the Court please.

Mr. Anthony: If the Committee please, we object to the admissibility of this statement in evidence. The witness on the stand now denies any recollection of anything that transpired.

(Argument by counsel on objection.)

Mr. Barlow: I will withdraw the offer.

Q. (By Mr. Barlow): Marvis, the things that you told Mr. Afook last week, were they the same as you told the FBI?

Mr. Anthony: I object to that as leading.

A. Yes.

Chairman Pratt: I think that that question is proper, Mr. Anthony. Considering the witness I think we have to have some leeway. The question is answered.

Mr. Barlow: All I am offering it for is what it is worth. It is admissible as evidence and the Committee can evaluate it.

Mr. Anthony: Mr. Barlow is very dogmatic about its admissibility. I challenge its admissibility.

Mr. Barlow: It is up to the Committee to rule on it.

(Argument by counsel.)

Mr. Barlow: With the Committee's permission I would like to hand Miss Fuller the statement which she [165] signed and ask her to testify.

(Testimony of Marvis Fuller.)

Mr. Anthony: That is what I have already objected to.

Chairman Pratt: I don't think that would be proper, Mr. Barlow. Is there any difference of opinion in the Committee?

Q. (By Mr. Barlow): Marvis, do you remember the first time that Mrs. Bouslog came to your house? A. Yes.

Q. Did Mrs. Bouslog ask to talk to your father?

A. Yes.

Q. Did Mrs. Bouslog go in to talk to your father? A. Yes.

Q. And after that did Dr. Chang come to your house? A. Yes.

Q. And then did Mrs. Bouslog come out of your father's room? A. Yes.

Q. And Dr. Chang was in there examining or doing—were you present when Dr. Chang was there? A. I was not, no.

Q. You left?

Questions by Chairman Pratt:

Q. Were you present in your father's room, the room in which your father was when Mrs. Bouslog spoke to him? A. Yes.

Q. Were you present? A. Yes. [166]

Q. Did you hear what was said?

A. I heard but I don't remember.

Q. You heard what?

Mr. Anthony: I heard but I don't remember.

Q. You heard but you don't remember.

(Testimony of Marvis Fuller.)

Q. (By Mr. Barlow): Did your father say anything to Mrs. Bouslog?

A. Not that I know of.

Q. You were there. Who did the talking, your father or Mrs. Bouslog? A. Mrs. Bouslog.

Q. Did your father answer Mrs. Bouslog?

A. No.

Q. What is your answer? A. No.

Q. He did not.

Questions by Mr. Peters:

Q. Then when Mrs. Bouslog was in the room with your father and you were present your father said nothing, is that correct? A. No.

Q. What is correct? Who did all the talking?

A. Mrs. Bouslog.

Q. All right now, you have got Mrs. Bouslog talking to whom? A. My father.

Q. Did your father answer? A. No. [167]

Questions by Mr. Barlow:

Q. Now were you present when your mother and Mrs. Bouslog had a conversation? A. Yes.

Q. When they talked to one another?

A. Yes.

Q. That same Friday were you present?

A. Yes.

Questions by Mr. Peters:

Q. Let's get where that occurred. Let's get something definite. When Mrs. Bouslog was talking to your mother where was she and your mother, in

(Testimony of Marvis Fuller.)

the living room or in the bedroom or in the kitchen or where? A. In the living room.

Q. In the living room, and so you were there, and Mrs. Bouslog was there and your mother was there, is that correct, in the living room?

A. Yes.

Q. Did you hear what Mrs. Bouslog said?

A. No.

Q. What? A. No.

Q. You didn't hear what Mrs. Bouslog said. Although you were present you didn't hear it?

A. No.

Q. Why didn't you hear it? Were you too far away? A. I don't remember.

Q. Or you didn't understand it, or what? [168]

A. I don't remember.

Q. Did you hear it? That's all I am asking.

A. Yes.

Q. Did you understand it? A. No.

Q. You didn't understand it. Did you hear your mother reply to Mrs. Bouslog? A. No.

Questions by Mr. Barlow:

Q. Now during this conversation, Marvis, did you hear your mother say to Mrs. Bouslog that your father had said he had lied?

Mr. Anthony: What is this?

Mr. Dodge: It seems to me that is contrary to what the Committee has ruled, that that statement cannot be used to refresh her memory.

Mr. Barlow: You mean that I can't use it?

(Testimony of Marvis Fuller.)

Mr. Dodge: That's right, indirectly do what you can't do directly.

Mr. Anthony: He is just putting words in the witness' mouth. This just happened a week ago. It's incredible that she would have no recollection of a week ago.

Chairman Pratt: The only situation which may differ, Mr. Anthony, is that the girl is obviously nervous and upset. Perhaps if we can calm her down she will recall what happened. [169]

Mr. Anthony: I'm not nervous and upset.

Chairman Pratt: No; I say she is.

Mr. Barlow: I will remove this statement from my presence so I am not violating any of the Committee's orders.

Q. (By Mr. Barlow): Marvis, on that occasion did you hear your mother say to Mrs. Bouslog that your father had lied in the eyes of God?

Mr. Anthony: Just a minute, if the Committee pleases, here is a leading question putting words in the witness' mouth.

(Argument by counsel on objection.)

Mr. Dodge: It seems to me you are either leading or improperly putting words in the witness' mouth, one of the two.

Q. (By Mr. Barlow): Marvis, right after Mrs. Bouslog had been to your house did the FBI talk to you? A. I don't know.

Q. You don't know. Did an FBI agent come to your house to interview you? A. Yes.

Q. A Mr. Weeks? A. Yes.

(Testimony of Marvis Fuller.)

Q. A big tall husky fellow? A. Yes.

Q. Did you tell that agent what happened between your father, your mother and Mrs. Bouslog and everything that [170] went on in the room?

A. Yes.

Q. And at that time when you told the FBI what happened were you telling the truth?

A. Yes.

Q. Did you make a statement to the FBI as to what happened? A. Yes.

Mr. Peters: Where is the statement to the FBI?

Mr. Barlow: I have the statement she gave to the FBI.

Mr. Peters: Will you tell the Committee whether there are contradictory statements for this statement of the witness? Is this statement of the witness correct as far as her statement to the FBI is concerned?

Mr. Barlow: Of course, I am in the position that she has made about seven or eight different contradictory statements. I don't think she knows herself what transpired.

Mr. Anthony: I agree with that, and I don't think she has anything to explain. Therefore, I think the witness should be excused and we should get on with the case.

Mr. Barlow: I do have in my possession what purports to be a statement made by the young lady to the FBI, and she has testified she remembered talking to the agent and that he took a statement from her. [171]

(Testimony of Marvis Fuller.)

Chairman Pratt: Will you answer Judge Peters' question whether that statement contains matter contrary to what she has just testified?

Mr. Barlow: The only way I could answer that, I would ask the witness to step out so that she wouldn't be influenced by what I have to say.

Chairman Pratt: Would you mind going out a few minutes, Marvis?

(Witness leaves hearing room.)

Mr. Anthony: May we have a copy?

Mr. Barlow: I only have one copy.

Mr. Anthony: I think we ought to have the document. I am accustomed to looking at original documents.

Chairman Pratt: Have you got the original document, Mr. Barlow?

Mr. Barlow: I don't have the original document. All I have is a copy of the statement that was furnished to me by the FBI which represents an interview that they had with her, and that's all I have.

Chairman Pratt: Let's follow the usual procedure then and show it to opposition counsel before you ask the question.

(Counsel examined the document referred to and presented argument.)

Mr. Barlow: I will withdraw the witness.

Chairman Pratt: No further questions? [172]

Mr. Barlow: No further questions.

Chairman Pratt: Mr. Anthony, do you have any reason to cross-examine her on what she said?

(Testimony of Marvis Fuller.)

Mr. Anthony: Just a minute. I don't think so.

Mr. Barlow: As long as the statement wasn't used, wasn't accepted, there is no reason for the Committee to have it.

Mr. Anthony: I would like to ask the witness one question. Will you get her back here?

MARVIS FULLER

resumed the stand, having been previously sworn, was examined further and testified as follows:

Cross-Examination

By Mr. Anthony:

Q. Marvis, you remember when your father was sitting on the jury, do you? A. Yes.

Q. Were you living at home all during that time? A. Yes.

Q. Can you tell the Committee about how long that trial lasted? A. No.

Q. A matter of months, wasn't it?

A. Yes.

Q. Several months? A. I guess so. [173]

Q. You think so. Did you ever hear your father talking with your mother about the trial?

A. No.

Mr. Barlow: I object to that as being immaterial.

Mr. Peters: She said no.

Q. (By Mr. Anthony): Didn't your father ever talk about the case at all?

(Testimony of Marvis Fuller.)

Mr. Barlow: I object to it as being immaterial. It is just a fishing expedition, if I may say so.

Chairman Pratt: Objection sustained.

Mr. Anthony: I can certainly cross-examine the witness, Mr. Chairman, on whether or not her father discussed it with the mother, any events that took place during the trial, if she knows.

Chairman Pratt: I don't see what it has to do with the matter we have before us, Mr. Anthony.

Mr. Peters: I agree with the Chairman on the ruling.

Mr. Dodge: I would agree with the Chairman. Perhaps it isn't proper cross-examination, but I don't think it is immaterial in view of the statements of the mother when she testified.

(Argument by counsel.)

Mr. Anthony: For the purpose of this inquiry, we will make this our witness. [174]

MARVIS FULLER

now called as a witness on behalf of the Licensee, having been sworn, testified further as follows:

Direct Examination

By Mr. Anthony:

Q. Marvis, you remember when your father would come home during the trial of the case?

Mr. Barlow: I object to the leading question.

Q. During the trial of the case? A. Yes.

Q. Did you ever hear your father talk about

(Testimony of Marvis Fuller.)

what went on? A. No.

Q. Well, your father and mother used to talk about it, didn't they, from time to time?

Mr. Barlow: Just a minute, I object to counsel arguing with the witness. It is immaterial, too.

Chairman Pratt: It would seem to me in view of the first answer, if this is your witness, that you are getting a little far afield in cross-examination, don't you think? I mean she said that she didn't hear him say anything about it.

Mr. Anthony: Now, I am pressing that. Certainly as to the relevancy the point is not well taken.

Mr. Barlow: On direct examination of your own witness you certainly don't argue with your own witness.

Mr. Anthony: I will leave it to the Committee.

Chairman Pratt: It seems to me it is a leading [175] question, Mr. Anthony, at the present time.

Q. (By Mr. Anthony): When your Daddy used to come home at nights what did you talk about?

A. I don't know.

Mr. Barlow: I object to the question as being leading.

Mr. Anthony: Will the Chairman straighten out Mr. Barlow?

Chairman Pratt: I think the question is not leading. He asked what he talked about.

Mr. Barlow: I am objecting to the fact that

(Testimony of Marvis Fuller.)

"Your Daddy came home at night." If that isn't leading, I don't know what is.

Mr. Anthony: The question is proper.

Mr. Pratt: It has been asked two or three times, Mr. Anthony, and she has specifically denied that he talked about the trial.

Mr. Barlow: I also object on the further ground it is irrelevant and immaterial what they talked about.

Mr. Pratt: I think we ought to sustain the objection, I mean on the general line of questioning, Mr. Anthony, not to that specific question as to what they were talking about, but the general line of questioning.

(Argument by counsel.)

Mr. Anthony: The Chairman has ruled, and I will abide by the ruling. No further questions.

Chairman Pratt: That's all, Marvis, thank you. [176]

(The witness was excused.)

Chairman Pratt: Perhaps we had better take a few minutes' recess for the reporter.

(Recess.)

Mr. Anthony: Are we ready to proceed, Mr. Chairman?

Chairman Pratt: Ready.

Mr. Barlow: No further witnesses for the Bar Association.

Mr. Anthony: At this time we would like to

offer in evidence a portion of the record in Criminal 10,495, United States of America vs. Fujimoto, et al., consisting of Supplemental Ground of Motion for New Trial and Affidavits in Support Thereof. It contains the motion, the affidavit of Ellen Fuller Cabreros, the affidavit of Harriet Bouslog and the affidavit of Jack Hall.

Mr. Barlow: I object to the introduction of everything except the introduction of the affidavit of Harriet Bouslog on the ground it is irrelevant and immaterial and has no bearing on the issues of this case.

(Argument by counsel on objection.)

Mr. Peters: I think the easiest way is to admit it and let Mr. Barlow have a motion to strike.

Mr. Anthony: That is the simplest way to handle it. [177]

Chairman Pratt: We will mark it Licensee's Exhibit B and permit Mr. Barlow to make a motion to strike at a subsequent time, so we will have an opportunity to examine it.

(The document referred to was marked Licensee's Exhibit B.)

Mr. Anthony: I now offer in evidence transcript of proceedings in United States vs. Fujimoto, Criminal No. 10,495 of June 19, 1953, bearing the certificate of the Court Reporter.

Mr. Barlow: I object to the introduction of this transcript on several grounds. First it is irrelevant and immaterial. The issue that is before your Com-

mittee is entirely different than the issues before Judge Wiig. The remarks that Judge Wiig made had to do with the demeanor of the lawyers in Court and in no wise can be interpreted to the conduct or demeanor or attitude or behavior of the defendants out of Court.

(Argument by counsel on objection.)

Mr. Peters: I think it ought to be admitted in the same way as the other.

Chairman Pratt: Licensee's Exhibit C, subject to motion to strike.

(The document referred to was received in evidence and marked Licensee's Exhibit C.)

Mr. Anthony: I would like now to offer in evidence a transcript of proceedings held in the same [178] criminal matter on December 16, 1952, which involves a colloquy between Mrs. Bouslog and Judge Wiig with respect to the so-called Honokaa incident. This happens to be an original certified by the Court Reporter.

Mr. Barlow: I make the same objection, that they are irrelevant and immaterial and are entirely unrelated to the matter before this Committee.

(Argument by counsel on objection.)

Mr. Peters: Let's have it come in and you can make a motion to strike.

Chairman Pratt: Exhibit D with the same right to move to strike.

(The document referred to was received in evidence and marked Licensee's Exhibit D.)

Mr. Barlow: May it please the Chairman of the Committee, in view of the fact that the Committee is accepting all this transcript involving Judge Wiig, I think the Committee Chairman should invite Judge Wiig to be present.

(Argument by counsel.)

Mr. Anthony: We now offer in evidence pages one, two and six of the Honolulu Advertiser of December 17, 1952. We are not offering it for the purpose of establishing the truth or falsity of anything in the article, but for the purpose of notoriety, the headline reading "Bouslog Talk Probe Due."

Chairman Pratt: Any objection, Mr. Barlow? [179]

Mr. Barlow: I object to the introduction into evidence on the ground it is irrelevant and immaterial, no proper basis or foundation has been laid for it, and it is entirely unrelated to the proceedings before this Committee.

(Argument by counsel on objection.)

Mr. Peters: Let's have it go in subject to motion to strike.

Chairman Pratt: Licensee's Exhibit E.

(The document referred to was received in evidence and marked Licensee's Exhibit E.)

Chairman Pratt: That is admitted subject to Mr. Barlow's examination and filing objections.

Mr. Peters: And subject to motion to strike if necessary.

Mr. Anthony: I offer in evidence copy of Honolulu Star-Bulletin of Tuesday, December 16th, 1952, pages one, two and three, the headline reading "Mrs. Bouslog's Speech Is Called Contemptuous."

Mr. Barlow: Same objection.

Chairman Pratt: Same ruling, Licensee's Exhibit F.

(The document referred to was received in evidence and marked Licensee's Exhibit F.)

Mr. Anthony: And a copy of pages one, two and fifteen of the Honolulu Star-Bulletin of December 17, 1952, the headline reading "Contempt Speech Probe Goes to U. S. Attorney." [180]

Chairman Pratt: Exhibit G.

(The document referred to was received in evidence and marked Licensee's Exhibit G.)

Mr. Anthony: We have no further evidence at this time. When does the Committee wish to reconvene?

Chairman Pratt: Wednesday, December 1st, at nine o'clock. The Committee thinks they can sit until three o'clock.

(Adjournment.)

Reporter's Certificate

I certify that the foregoing is a full, true and correct transcript of proceedings in the above-entitled matter on November 23 and 24, 1954.

Honolulu, T. H., January 15, 1956.

/s/ L. T. CHAFFEE,
Official Reporter. [181]

Morning Session—December 2, 1954

The Chairman: I understand, Mr. Barlow, that you are ready to proceed.

Mr. Barlow: I don't see any need to wait.

The Chairman: We would like to start, then.

Mr. Anthony: Is the Chairman ready to proceed?

The Chairman: Yes.

Mr. Anthony: At this time we offer in evidence Exhibits E, F and G, newspapers of December 16th and 17th.

The Chairman: No objection, Mr. Barlow?

Mr. Barlow: No objection.

The Chairman: It will be received.

(The newspapers referred to were received in evidence as Licensee's Exhibits E, F and G.)

Mr. Barlow: May we have stated on the record the purpose and reason for it?

Mr. Anthony: It is already stated.

The Chairman: I think Mr. Anthony made the statement just before we adjourned.

Mr. Barlow: May I be refreshed as to what it is?

Mr. Anthony: The purpose is the notoriety of this incident. Will you swear the witness?

ELLEN FULLER CABREROS

a witness on behalf of the Licensee, being duly sworn, testified as follows:

Direct Examination

By Mr. Anthony:

Q. Mrs. Cabreros, where do you live? [183]

A. 3340-B Monsarrat Avenue.

Q. Where were you born?

A. Honolulu.

Q. How old are you? A. 31.

Q. Are you married? A. Yes.

Q. Do you have any children? A. One.

Q. And are you employed?

A. Yes, in Libby, McNeil and Libby.

Q. What is your job down there?

A. Packer, grader, packer.

Q. Ellen, you are going to have to speak a little bit louder, if you don't mind, please. You are a member of the I.L.W.U.? A. Yes.

Q. What is the local number? A. 142.

Q. Are you related to David Fuller?

A. Yes, he is my brother.

Q. Do you know how old David is?

(Testimony of Ellen Fuller Cabreros.)

A. I think he is about 40 or 41.

Q. Is he older or younger than you?

A. Older.

Q. Ellen, are you familiar with the fact that your brother David sat on the jury in the case of United States versus Fujimoto, et al.? [184]

A. Yes.

Q. Do you recall at any time seeing your brother after the verdict was entered in that case?

A. After the verdict, yes, I seen him.

Q. Will you please state to the Committee the circumstance that you went to visit your brother?

Mr. Barlow: May we have the time established?

Mr. Anthony (to the Witness): Proceed.

A. I went to visit my mother. She lives right in front of my brother on Dillingham Boulevard. I went there and I asked—no—she told me, "Oh, your brother is very ill after the verdict." I say, "What is wrong with him?"

The Chairman: I wonder, could you tell us when this was, Ellen?

The Witness: It's so long, I can't remember.

The Chairman: But was it right after the verdict or just when?

The Witness: Yes, about three or four days after.

The Chairman: I'm sorry to interrupt you. Go ahead.

Q. (By Mr. Anthony): Then what did you do, Ellen?

A. So I asked my mother what was wrong with

(Testimony of Ellen Fuller Cabreros.)

him. She say, "I think he is worried about the trial."

Q. Did you go to see your brother?

A. After I told her I must go see him because he is my brother, so I went around the block, I went to his house.

Q. Where does he live?

A. On Colburn Street, 1748, I think, Colburn Street.

Q. Do you recall what time of the day this was? [185]

A. It was about a quarter to six, I think it was.

Q. In the afternoon? A. Yes.

Q. And who was there at your brother's home when you entered?

A. My sister and my niece.

Q. What is your sister's name?

A. I mean sister-in-law.

Q. What is her name? A. Helen Fuller.

Q. And who else?

A. And her daughter Marvis, M-a-r-v-i-s.

Q. Tell the Committee what you did and what was said on that meeting?

A. I knocked on the door and told her if I could come in.

Q. What did she say?

A. She say, "Yes, you could." I said, "Could I see my brother?" She said, "Yes." So I went in the front room to the hallway and I seen my brother laying in bed.

Q. What was his appearance? How did he look?

(Testimony of Ellen Fuller Cabreros.)

A. He looks like he was dead.

Q. Did your sister-in-law go in the room with you?

A. We all went in, me, my sister-in-law and my niece went in the room.

Q. Did you speak to your brother?

A. When I seen him I cried to see him in that way, so I told him what's wrong with him. He said he have something in his chest he wants to bring out, he wants to confess. So [186] I told him——

Q. Did he say anything else as to what he wanted to confess?

A. Yes. He told me he wanted to confess that the case was a frame-up. So I told him if he wanted help, I could help him if he wanted help. So he told me, he nodded his head and he said anybody any time talk to. So I told him if he wanted to talk to Bouslog. I knew they are lawyers. So he said, "Yes, anybody, any time." So I turned over and asked my sister, my sister-in-law, permission if she wanted help, "I think I could help you." So she begged me for help and my niece begged me for help. So I said, "You are sure you want help?" She said, "Yes." So I went to the 'phone and I asked her again before I picked the 'phone up, I asked her, "You are sure, now, because I know it's against the law, you know, if you don't want help you cannot get—if you don't have the permission, you cannot do that." So I told her, O.K. I called Harriet Bouslog up and told her——

Q. Just a minute right there. You are talking

(Testimony of Ellen Fuller Cabreros.)

about this lady in the white dress here, is that right? A. Yes.

Q. Did you know her before?

A. At the Union hall I seen her once in a while.

Q. Had you ever been introduced to her?

A. Yes, at the Union hall.

Q. I see. Did you get Mrs. Bouslog on the 'phone?

A. Yes, because we carried the lawyers' numbers with us. We carried the law books and all with us. [187]

Q. The law books?

A. Yes, parliamentary procedure.

Q. Those books are supposed to tell you what to do when you get in the toils of the law, is that it? A. Yes.

Q. And the 'phone number is right in the book?

A. Right, home and office 'phone numbers.

Q. And you got her at the office?

A. No, at the home.

Q. At her home?

A. It was after working hours.

Q. Oh, I see. It was 6:00, some time after 6:00 o'clock? A. No, it's almost 6:00.

Q. Well, what did you tell Mrs. Bouslog?

A. I told Mrs. Bouslog, I told her that my brother was very ill and he wanted help, could you come down and help because the sister-in-law is crying for help.

Q. Did you tell her over the 'phone what your brother was talking about? A. No.

(Testimony of Ellen Fuller Cabreros.)

Q. And what did Mrs. Bouslog say?

A. I told her to come down. She asked me where is the place, so I told her the address and where.

Q. And did she later come down?

A. She came down, I think it is almost 6:00 o'clock she came down. And my girl friend—it was so long she couldn't find the place, so I told my girl friend to look for them on the corner. [188]

Q. Who is your girl friend?

A. Grace Oshiro.

Q. Was she visiting your brother, too?

A. No, she wasn't there. She was at my sister's house right next——

Q. And you asked Grace to go look for Mrs. Bouslog, is that right? A. Yes, I called over.

Q. And then did Mrs. Bouslog finally arrive?

A. Yes.

Q. Please tell the Committee what happened when Mrs. Bouslog arrived? What did she do and say?

A. When Mrs. Bouslog arrived, I called my girl friend over, the three of us went in and——

Q. Went in the house, you mean?

A. In the house. So I introduced Harriet Bouslog to my sister-in-law, told her that this is Harriet Bouslog, the one that I called over on the 'phone. She was glad to meet her. So Harriet, Mrs. Bouslog, asked her where was your husband. She said, in the room. So she guided us all in and we went in, and my sister and my niece and my girl friend, Harriet Bouslog and me, went in the room.

(Testimony of Ellen Fuller Cabreros.)

Q. Is that a small room?

A. A little bigger—a little smaller than this.

Q. One bed in the room?

A. Yes, a bed, a crib and two chairs and a dresser.

Q. And when Mrs. Bouslog went in the room, what did she say, if anything, to your brother? [189]

A. We all stand and look at my brother. So she went over and she said, "Hello, David, I'm Mrs. Bouslog," introduced herself to him. And he was glad to see her. A man of—I don't know—it's hard to explain. So she sat down by the bed on the chair right next to him, and I sat right near to him, too.

Q. Where was Mrs. Fuller?

A. She was standing off by the bed, at the foot of the bed.

Q. And where was Marvis?

A. She was standing right next to the crib. And my girl friend was by the door there, just walking in and out.

Q. Your girl friend? A. Yes.

Q. And how did David speak? Was it distinct or loud, or soft, or how was it?

A. He speaking in a whispering——

Q. Low tone of voice? A. Yes.

Q. And were you able to hear what he was saying?

A. A little. Most of it I could hear.

Q. Can you tell the Committee what he was saying?

(Testimony of Ellen Fuller Cabreros.)

A. He was, he was telling us he have something in his chest he wants to bring out that he did.

Mr. Anthony: Can the Committee all hear? Can the Committee all hear the witness?

Mr. Dodge: Not quite.

Judge Tracy: It's a little hard to hear her.

Q. (By Mr. Anthony): Ellen, you are going to have to speak [190] up just a little bid louder. I asked you what was your brother saying as you were all in the room there together?

A. He was saying that he did something wrong that he wanted to bring out of his chest. He said the case was a frame-up. He did something wrong in the sight of God and it was a frame-up.

Q. Now, how long approximately were you in the room with Mrs. Bouslog and your brother? Can you give us any idea?

A. We were in there quite long.

Q. Were you there 10 minutes or 15 minutes or—— A. About 20 minutes.

Q. About 20 minutes?

A. Or 30 minutes. Then my sister-in-law told us she was expecting the doctor.

Q. And then did the doctor come?

A. Yes, the doctor came and when the doctor came we all walked out. We could hear him saying what was wrong with him. So he examined him. He say nothing was wrong with him.

Judge Peters: What was the doctor's name that came in?

(Testimony of Ellen Fuller Cabreros.)

The Witness: Dr. Chang.

Q. (By Mr. Anthony): Now, at any time did Mrs. Bouslog go in the room with your brother alone when you were there? A. No.

Q. Now, how far away were you from your brother's room when the doctor was in there examining him?

A. In the next room, in the living room.

Q. There are thin walls in this room? [191]

A. Yes. The door was open.

Q. The door was open?

A. Yes. The hallway door.

Q. Were you able to hear what the doctor was saying to your brother? A. No, no.

Q. Were you able to hear anything that your brother said to the doctor?

A. Yes, I heard him tell the doctor it was a frame-up.

Judge Peters: How could you hear your brother talking if he was talking in a whisper? And you couldn't hear the doctor and you could hear your brother and you say your brother was talking in a whisper?

The Witness: He kind of yell, kind of talk loud because he knew there was a doctor, I guess, because the doctor said nothing was wrong with him.

Q. (By Mr. Anthony): Do I understand you, that sometimes your brother would speak in a whisper and sometimes he would yell?

A. Yes.

Q. Now, after the doctor came out of your

(Testimony of Ellen Fuller Cabreros.)

brother's room, I understand he told Mrs. Fuller that there was nothing wrong with him?

A. Yes.

Q. Then what did the doctor do?

A. The doctor came by the hallway almost to the parlor and asked my sister-in-law what is this all about. So my sister-in-law say it's about the verdict he had in the Smith Act. He [192] said it's a frame-up, he said, that's why he is like that. So the doctor told her, if he don't get out of bed to use the bathroom, he has to go to the hospital.

Q. Then what did the doctor do?

A. The doctor went.

Q. Then what did Mrs. Bouslog do?

A. After we all went back in the room again, the same people, went back in the room.

Q. The same people? By the same people, you mean who, yourself——

A. Myself, Harriet, my sister-in-law; my girl friend and my niece.

Q. And how long were you in the room the second time, approximately?

A. About 15 minutes. Harriet Bouslog was talking more to Mrs. Fuller. She told my sister-in-law that she thinks he needs a rest.

Mr. Dodge: Needs a what?

The Witness: A rest.

A. (Continuing): So she thinks that we better leave. So my brother started to mumble. So when she looked back at my brother, she said, "What do you want? Do you want a drink of water or do you

(Testimony of Ellen Fuller Cabreros.)

want to sit up?" And all that. He nodded his head and said, "Yes."

Q. (By Mr. Anthony): Did Mrs. Bouslog give him any water?

A. Yes, she made him sit up; for the first time he sat up. He sat up and she asked him if he wanted a drink of water, because his throat was so dry. He said, "Yes," he nodded his [193] head. So she asked my sister-in-law to go and get some water and a spoon. So Harriet Bouslog got the spoon in the glass and gave him, feeding him water. Then he started to mumble again, but kind of clear because I was right next to him. He started talking. He said that all the people is good, good people; all he was talking about, talking about, he did something wrong in the sight of God, and it's a frame-up, and all that. So Mrs. Bouslog said, "Do you want a rest? We will go, and do you want to talk to anybody else?" And he said, "Yes," he still wants to get something out of his conscience he didn't get out yet. So he said he would talk to anybody any time. So Mrs. Bouslog told him if he wanted to see Jack Hall. So he said, "Yes, anybody, any time." So she told my brother, "You had better rest. Tomorrow he might come to see you." Jack Hall.

Q. What happened after that, Ellen? Did you leave then?

A. Right after that when she told him that we will be back if you want to see Jack Hall.

Q. Did you ever return again?

(Testimony of Ellen Fuller Cabreros.)

A. The next day, yes, Saturday, the next day.

Q. The next day you came back, is that right?

A. Yes. It was almost when Jack Hall and Harriet Bouslog was there. I came in when they almost was leaving.

Q. What was that again?

A. When I came, when I went to my brother's house, it was, they almost leaving.

Q. Now, after you left your brother's house on the first occasion, did you talk to Mrs. Bouslog over the 'phone? A. No. [194]

Q. Back to the second visit, what time, approximately, was it you arrived at your brother's house?

A. I don't remember.

Q. Was it in the morning or afternoon?

A. Afternoon.

Q. And was Mrs. Bouslog there when you arrived or not?

A. No, first I went there to my sister-in-law that day and asked her—no, I called up and asked her how was my brother. And she said, "Fine, he is better than yesterday." So I told her, Well, you want to see Jack Hall? O.K. So I think I called her on the 'phone and told her that he was O.K., to be there. And my brother was well, better than he was.

Q. Now, what I want to get at is, when you arrived at your brother's house on the second occasion, who was there?

A. Jack Hall and Harriet Bouslog.

Q. And you said a moment ago that they were

(Testimony of Ellen Fuller Cabreros.)

just about ready to leave when you arrived, is that right? A. Yes.

Q. Did you go in your brother's room?

A. No, it was in the dining room. He was sitting down. When I walked in I heard him say, "Don't leave, don't leave."

Q. Your brother, was he in bed or did he have his clothes on?

A. He had his clothes on, sitting on the settee.

Q. On what? A. Settee.

Q. Was Grace Oshiro there on that second visit?

A. No; she was in a car waiting for me. [195]

Q. Now, some time after that Mrs. Bouslog asked you to sign an affidavit as to what transpired in the Federal Court, is that right, an affidavit to be filed in court about this Smith Act case?

A. About my brother?

Q. About your brother. A. Yes.

Q. And she prepared an affidavit and you signed it, is that right? A. Yes.

Q. Did you read that affidavit when you signed it? A. Yes.

Q. Did you go over it carefully?

A. I think so.

Q. And was that your best recollection of what happened as set forth in that affidavit?

A. It had lots more but I can't remember all. It was so long.

Q. Now, Ellen, your sister has told this Committee that you said that you frequently had lunch with Jack Hall?

(Testimony of Ellen Fuller Cabreros.)

A. No, I don't even know where he lives. I can't go there and have lunch with him.

Q. Have you ever had lunch with him?

A. No.

Q. Have you ever been in his house?

A. No. I don't know where he lives.

Q. Did you ever have lunch in a restaurant with him? A. No. [196]

Q. How about these big Union blowouts that you have?

A. We had lunch in a restaurant but not with him sitting with us.

Mr. Anthony: No further questions. Just one minute.

Judge Peters: I would like to understand the purpose of this evidence, Mr. Anthony.

Mr. Anthony: The purpose of this evidence?

Judge Peters: Yes.

Mr. Anthony: The purpose of this evidence is to show the facts and circumstances surrounding the taking of the affidavit.

Judge Peters: Is that all?

Mr. Anthony: Well, it is an impeachment as well.

Judge Peters: Impeachment of what?

Mr. Anthony: Contradiction of the evidence of Mrs. Fuller.

Judge Peters: Anything else?

Mr. Anthony: I haven't at this stage exhausted the possibilities of the purposes for which the evidence can be used, but it is offered for all purposes

(Testimony of Ellen Fuller Cabreros.)

in defense, in opposition to this that is submitted here.

Judge Peters: Well, do you understand that the Bar Association contends that the allegations of this affidavit were false?

Mr. Anthony: No, the Bar Association takes no position whatsoever on that. The Bar Association's position, if I may surmise, is that there is something improper about a lawyer talking to a juror, which is a matter of law, in my opinion, and [197] it is wholly without merit.

Judge Peters: Well, if there is no controversy in these statements, what are we here for as far as this witness is concerned? Supposing this lady, Mrs. Fuller, testifies to one circumstance and this witness denies it, what does that go to show? In other words, Mr. Anthony, as far as this Committee is concerned, is there any controversy about Mrs. Bouslog getting this affidavit?

Mr. Anthony: None whatsoever. None whatsoever.

Judge Peters: Then, as you say, there is no controversy between you and the Bar Association as to the truth or falsity of the contents of the affidavit, what difference does it make if this woman testifies to one set of circumstances and Fuller's sister testifies to another?

Mr. Anthony: That question should have been addressed, if I may say so, to Mr. Barlow when he first put on Mrs. Fuller. If your Honor will recall——

(Testimony of Ellen Fuller Cabreros.)

Judge Peters: I suppose.

Mr. Anthony: ——if I may finish, Judge—if your Honor will recall, I suggested to this Committee that this was a relatively simple issue, and I suggested that we file the proceedings in the Federal Court. We admitted the making and the filing of the affidavit and the law question that would flow from that could be decided by the Committee. That suggestion was not accepted by Mr. Barlow. He decided that he wanted to produce live testimony of the facts. Now, in response to that, if he is going to produce live testimony as to the facts, it is incumbent upon me to produce live testimony as to the facts [198] insofar as my client understands them.

Judge Peters: Are you through now?

Mr. Anthony: And I might also point out that in the Bill of Particulars there is an obscure sentence which says that not only did the defendant do wrong in taking an affidavit—which, of course, is wholly without merit—but also that under the facts and circumstances she did wrong——

(Discussion off the record.)

(The hearing recessed at 10:55 a.m.)

Reporter's Certificate

I, Albert Grain, Official Court Reporter, do hereby certify that the foregoing is a true and cor-

(Testimony of Ellen Fuller Cabreros.)

rect transcript of proceedings had before a committee of the Bar Association in the matter of Harriet Bouslog Sawyer on December 2, 1954; that I reported and transcribed same.

Jan. 17, 1956.

/s/ ALBERT GRAIN.

Thursday, December 2, 1954; 1:30 P.M.

Mr. Pratt: I think we had better proceed. The committee's ruling for that, it will not make any finding as to the truth or falsity of the contents of the affidavit but may include in its report its findings as to the circumstances under which the affidavit was obtained, if such is material to the conclusion which it reaches. That's the only one we have. You can copy it.

Mr. Anthony: May I have Exhibit B, Mr. Chairman?

ELLEN FULLER CABREROS

Direct Examination
(Continued)

By Mr. Anthony:

Q. Mrs. Cabreros, I hand you Licensee's Exhibit B, and ask you to peruse that portion of it which is entitled Affidavit of *Galen* Fuller Cabreros. Will you please go through that? You read the whole thing, that's right. Have you read that affidavit? [200] A. Yes.

(Testimony of Ellen Fuller Cabreros.)

Q. Do you recall having signed such an affidavit? A. Yes.

Q. And who drew that affidavit up? Who prepared it? A. Harriet Bouslog.

Q. And where were you when the affidavit was drawn up? Was that in her office?

A. Uh-huh.

Q. Will you tell the Committee just how the affidavit was made? She call in a stenographer and dictate all of it; how was it done to the best of your recollection?

A. She wrote it down herself, take down herself.

Q. She made notes? A. Uh-huh.

Q. Did she later call in a stenographer to have it typed up?

A. No, I don't think so. I don't remember.

Q. You don't remember that? A. No.

Q. Now, I notice this affidavit was signed on the 29th of June, 1953? A. Uh-huh.

Q. Now, that was very shortly after your brother got very sick, was it not? A. Yes.

Q. Were the matters and things which you stated in this affidavit true to the best of your information and belief? A. Yes. [201]

Q. Now, Mrs. Cabreros, were you ever interrogated by the F. B. I. in regard to this matter?

A. No.

Q. Were you ever questioned by Mr. Barlow?

A. No.

Q. Were you ever questioned by Mr. Afook of

(Testimony of Ellen Fuller Cabreros.)

the Attorney General's Department? A. No.

Q. Were you questioned by anyone from the U. S. Attorney's Office? A. No.

Q. No further questions.

Cross-Examination

By Mr. Barlow:

Q. Mrs. Cabreros, getting back to this affidavit, Mrs. Bouslog had it all prepared and you came in and signed it, is that the way it happened?

A. She asked my permission first.

Q. What did she say to you?

A. If I would sign this affidavit, that I heard everything, and I said, "Yes, I will because it's the truth."

Q. Well, when Mrs. Bouslog brought this affidavit to you, had you told her what went on or did she present the affidavit to you and say, "Mrs. Cabreros, this is what happened. Will you sign it?" What way did it happen?

A. I went to the office. [202]

Q. Yes?

A. And she told me about the affidavits.

Q. Did she have the affidavit all ready for you to sign when you got there? A. No.

Q. How did it, explain to the Committee the mechanics, how it came about that you went to the office?

A. After my brother was ill like that, I found him ill like that, I was contact Harriet Bouslog tell-

(Testimony of Ellen Fuller Cabreros.)

ing her that he was getting better and all that and then she told me that she made an affidavit for me, if I would sign it, so I went down and she had it in a paper like that, in a yellow book, and after she made it out she told me to sign it.

Q. Now, how friendly are you with your brother? You on speaking terms with him?

A. Yes, we are but not my sister-in-law. I talk to my brother but not my sister-in-law.

Q. Prior to the time that you went to see David in the latter part of June, 1953, when was the last time that you set foot into that house?

A. That was the last time when he was ill like that.

Q. No, before that. Was it then a year or two ago that you were there? A. I was around.

Q. In other words, you had not been in the house for about a year or two before your brother got sick, is that right? A. Yes. [203]

Q. Now, did you attend the Smith Act trials?

A. Yes.

Q. Did you sit in Row 2 or 3 during the Smith Act trial? A. Way behind.

Q. Where did you sit? What row?

A. In the last row, by the window.

Q. Way back? A. Uh-huh.

Q. Could you see your brother? Could your brother see where you were sitting? A. Yes.

Q. Could you see your brother?

A. Uh-huh.

(Testimony of Ellen Fuller Cabreros.)

Q. Did your brother look at you during the trial? A. No.

Q. Never looked at you? A. No.

Q. Did you look at your brother?

A. Sure.

Q. Now, when was the first time that you heard that your brother was sick?

A. That very day that I found out from my mother.

Q. You found out from your mother?

A. Yes.

Q. And you went——

A. To see him. [204]

Q. To see your mother and she told you that David was sick, is that right? A. Yes.

Q. And then what happened after that? Did you go to see David?

A. Yes, right after I talk to her, and told her that I have to go see him because he is my brother.

Q. And did she object to your seeing her?

A. No.

Q. You went in and you talked to her and talked to your brother, is that right?

A. I just talked to my brother when I was there.

Q. You talked to Mrs. Fuller when you went in first? A. Permission from her to see him.

Q. You went in and talked to David?

A. Yes, with the presence of my sister-in-law. Anyway, she was in the room trying to feed him.

Q. That's Mrs. Fuller? A. Yes.

Q. David's wife? A. Yes.

(Testimony of Ellen Fuller Cabreros.)

Q. She was trying to feed him and you were talking to him?

A. No. I stand there and look at him like that in that condition.

Q. And what condition was he in, would you say? A. Bad condition. [205]

Q. Bad condition? A. Yes.

Q. You testified he looked dead to you?

A. Yes.

Q. Did you feel that your brother was bad when you were talking to him? A. Yes.

Q. He understood what you said?

A. I think so.

Q. And you carried on a regular conversation, is that right? A. Uh-huh.

Q. And you talked about the Smith Act trials?

A. No, not to him.

Q. You did not talk about the Smith Act trials?

A. No.

Q. What did you talk about?

A. Talk to him what was wrong.

Q. What was——

A. He said "frame-up, frame-up," and I said, "What do you mean by that?"

Q. Was Mrs. Fuller—— A. Yes.

Q. And Marvis was there? A. Yes.

Q. And just you two, you three and David, right? A. Yes. [206]

Q. And he kept, was he whispering "frame-up" or yelling or shouting? Was he talking in a normal tone? A. Whispering.

(Testimony of Ellen Fuller Cabreros.)

Q. Just whispering? A. Yes.

Q. And would you say he couldn't talk?

A. He couldn't talk too loud.

Q. Couldn't talk loud? A. Yes.

Q. And couldn't talk about it, just whisper?

A. Almost whisper.

Q. Always——

Mr. Symonds: Almost whispering.

Q. Almost whispering. And did he continue to whisper all during your conversation with him on that occasion? A. Yes.

Q. Just whisper?

A. Certain times he comes up loud.

Q. By loud, what do you mean? In a loud yell or loud voice? A. No, louder than a whisper.

Q. Louder than a whisper? A. Yes.

Q. And would you indicate to the court what you mean by whisper? Show the court, show the court what you mean by a whisper. [207]

Mr. Pratt: He means about how loud was he talking. Could you say it in a few words in about the same tone that he was using?

A. Court——

The Court: Pardon?

A. Frame-up.

Q. You say that was the whisper? When he talked louder, how much louder was it? You speak up, you know, the same tone that he used.

A. Frame-up, frame-up.

Q. That was the difference between the two tones of voice that your brother used?

(Testimony of Ellen Fuller Cabreros.)

A. And sometimes you have to go way down to hear him talking.

Q. By going way down, you mean put your ear next to his mouth? A. Yes.

Q. So that you could hear what he said?

A. Yes.

Q. Now, while you were in the room with Mrs. Fuller and Marvis, the daughter, did your brother talk loud enough so that they could hear what he was saying? A. No.

Q. He would talk loud enough?

A. Yes, they understand what he was talking.

Q. They understood, and in the presence of Mrs. Fuller, your brother used the words "frame-up"?

A. Uh-huh. [208]

Q. Is that right, and if Mrs. Fuller says that Mr. Fuller didn't say it, then she's lying?

A. Yes.

Q. All right now, what did your brother say on that occasion?

A. He said the same thing, he said "good morning."

Q. Well, repeat it.

A. He told me that he wanted to confess, he wanted to get his chest clear. He wanted to talk to anybody. I told him what was wrong with him. He say he did something wrong in the sight of God. I asked him if he wanted help I could give him, I think I could help him if he wanted help. He said yes, and then I said who you want to talk. He said

(Testimony of Ellen Fuller Cabreros.)

anybody. I said if you wanted Bouslog. He said anybody, any time.

Q. What made you think of Mrs. Bouslog when he said he wanted to talk to somebody?

A. I think that's the only attorney or lawyer I know.

Q. Well, why did you think of a lawyer or an attorney when Mr. Fuller said he wanted to talk to anybody in the world? Why did you immediately think of Harriet Bouslog?

A. Because I know she's a lawyer, that is why.

Q. And isn't it true, Mrs. Cabreros, that you went down there after the request of Mrs. Bouslog?

A. No.

Q. Who asked you to go down to see your brother, David? [209]

A. I went on my own because I heard, I went to my mother's house to visit her and she told me that my brother was sick so I went on my own.

Q. And when your brother——

A. To see him.

Q. Excuse me. When your brother said he wanted to talk to anybody in the world, the first person you thought of was Harriet Bouslog?

A. Yes, I told him maybe she could help him.

Q. How did you feel Mrs. Bouslog could help your brother? A. Because she's a lawyer.

Q. Well, what did you feel she could do for your brother if he was sick?

A. She could explain to him that he didn't do anything wrong or what he did, I don't know.

(Testimony of Ellen Fuller Cabreros.)

Q. If your brother was so sick, why did you think of a lawyer? Why didn't you think of a doctor?

A. Because he wanted to confess and that is the only thing that can be, to confess.

Q. What religion are you?

A. I'm a Pentecostal.

Q. When you confess, do you confess to a lawyer or is there some superior being in your religion?

A. Confess to God.

Q. You confess to God? A. Yes.

Q. And did you feel Harriet Bouslog was God in this case? [210] A. No.

Q. When your brother wanted to confess, why did you think of a lawyer? Why didn't you think of God or some minister he could confess to?

A. Because my sister-in-law told me that he wanted to confess to Judge Wiig and they wouldn't let him go over to confess.

Q. Your sister-in-law told you he wanted to confess to Judge Wiig? A. Yes.

Q. And your sister-in-law wouldn't let him go to Judge Wiig? A. Uh-huh.

Q. And then you decided that if he couldn't confess to Judge Wiig, the next best person to confess to was Harriet Bouslog? A. Yes.

Q. Is that your decision? A. Yes.

Q. And you decided that Mrs. Bouslog should come and have your brother confess? A. Yes.

Q. That it was a frame-up, is that right?

A. Yes (nod of head).

(Testimony of Ellen Fuller Cabreros.)

Q. Now, then, what happened?

A. So I asked my brother if he wanted to talk to Bouslog, and he said, "yes, anybody, anytime." So I [211] turned over to my sister and ask her if she wanted help. She wanted me to call Bouslog, that's all I know anyway, attorneys, lawyers. So I asked her and she said, "please," she beg me for help so I called Harriet Bouslog.

Q. Didn't you think it was rather strange that your brother wanted to talk to the Judge who presided at the trial and your sister-in-law didn't want him to go to the judge?

A. Because he was ill and we tried to do that.

Q. Yes, but didn't you think it rather strange that your sister-in-law didn't want him to go to Judge Wiig and you should recommend that he speak to Harriet Bouslog? You don't think that was strange, is that right?

A. Yes (nod of head).

Q. When did you speak to Mrs. Bouslog before you called her on the telephone on the 26th of June, 1953? When was the last time you had spoken to her before that? A. Before that illness?

Q. Yes.

A. I used to see her at the courthouse and just say, "Hello," that's all.

Q. Never had any conversation with her?

A. No.

Q. You never talked to her before you went down to see your brother? A. No.

Q. Did you talk to anybody else before you went

(Testimony of Ellen Fuller Cabreros.)

down [212] to see your brother, either from the defense table or from the I. L. W. U.?

A. No.

Q. Nobody? A. No (nod of head).

Q. So your visit to your mother was purely, solely, and wholly, your idea? A. Yes.

Q. And your visit to David was your idea?

A. Yes.

Q. And the suggestion that your brother talk to Harriet Bouslog and confess was your idea?

A. Yes.

Q. Nobody else suggested that to you?

A. No.

Q. You thought of it all by yourself?

A. Yes.

Q. Why didn't you think of having your brother go to see the judge?

A. I didn't stop him from going there. My sister-in-law tell me right after the verdict came out he tried to go. I didn't know he wanted to go until my sister-in-law told me.

Q. That he wanted to go see the judge?

A. Yes, but they stop him.

Q. Why did you concur with your sister-in-law's thinking or recommendation that he talk to the judge? [213]

Mr. Anthony: That's a misstatement of her evidence. The evidence is that David Fuller said he wanted to go to the judge, but the sister-in-law said that he couldn't. She wouldn't let him go to

(Testimony of Ellen Fuller Cabreros.)

the judge, that's the evidence. This woman had nothing to do with that.

Q. Did you at any time suggest to your sister-in-law or to your brother, David, that he should go to see Judge Wiig? A. No.

Q. Never? A. Never.

Q. The first time that the suggestion came up that your brother wanted to confess, you immediately thought of Harriet Bouslog? A. Yes.

Q. Is that right?

A. Yes, because my sister-in-law told me that, I told him how come he cannot talk, he cannot talk so loud, his voice is all hoarse. She said from yelling and wanting to confess and all that.

Q. Now, you say that you called up Harriet Bouslog and you had a card with her telephone number?

A. Yes, we know the lawyer's telephone number by heart.

Q. You know it by heart. In other words, you know Mrs. Bouslog's home telephone number by heart? [214] A. Yes, at that time.

Q. You know her home telephone number by heart today? A. No.

Q. But on that occasion, you knew?

A. Yes.

Q. Why is it you knew it a year ago, and you don't know it today? You don't choose to answer that question? A. No.

Q. All right. Now, Mrs. Cabreros, you stated

(Testimony of Ellen Fuller Cabreros.)

this morning that you were an engraver and a packer? A. Yes.

Q. How long have you been an engraver and a packer? A. Six years now.

Q. Six years now? A. Almost.

Q. Now, what position do you hold in the I. L. W. U. at the present time?

A. Head steward.

Q. You are a what? A. Head steward.

Q. You are a head steward? A. Yes.

Q. Frankly, I don't know what that means, so would you mind explaining it. What are your duties as a head steward?

A. Help the workers, the union workers. They need advice, they come to us. [215]

Q. As head steward, are you appointed by anybody or are you elected by anybody? How do you get to be head steward?

A. Appointed by the members of the I. L. W. U.

Q. You are appointed?

A. At the cannery, we have a committee.

Q. You mean the workers at the cannery go out and elect you head steward, is that it?

A. No, the officers, like we have president of that unit——

Q. The president of that unit has a meeting with the officers and then they select you as head steward? A. Yes.

Q. Now, when were you selected as head steward in that unit? A. Last year.

Q. When last year?

(Testimony of Ellen Fuller Cabreros.)

A. In February they appoint.

Q. February of 1953? A. Yes.

Q. And when did you assume the duties of head steward at Libby, McNeal and Libby?

A. 1952, I think. I forgot the date.

Q. Was it last year? A. No, 1952.

Q. So that you became head steward in 1952?

A. Yes. [216]

Q. And you were head steward in June of 1953, is that right? A. Yes.

Q. You were a head steward then?

A. Yes.

Q. Now, had anybody talked to you about going to see your brother, David, before the time that you actually went in and talked to him? A. No.

Q. Nobody at all? A. No (nod of head).

Q. Now, when you called Mrs. Bouslog, she came several minutes later, 15, 20 minutes later, whatever you testified to?

A. I think it was about 15 or 20, I don't know.

Q. She came down? A. Yes.

Q. And what did Mrs. Bouslog say?

A. She came in the house by the door and I called my sister-in-law and introduce her to Harriet Bouslog. She was glad to meet her. So she ask my sister-in-law where is my brother, so she said in the bedroom, so we went in the bedroom.

Q. And then did Mrs. Bouslog have a conversation with your brother? A. Yes.

Q. In your presence? A. Yes. [217]

Q. And who did the talking? Did your brother

(Testimony of Ellen Fuller Cabreros.)

volunteer any information or did Mrs. Bouslog ask questions of your brother?

A. He volunteered.

Q. He volunteered? A. Yes.

Q. And what did he volunteer?

A. Say he wanted to get his chest cleared. He want to confess that the case was a frame-up.

Q. And that was said by Mr. Fuller in the presence of Mrs. Bouslog, you——

A. My sister-in-law.

Q. Your sister—— A. ——in-law.

Q. In-law? A. My girl friend.

Q. Your girl friend, Grace Osero and Marvis?

A. Yes.

Q. And this was the first night which was a Friday night, June 26? A. Yes.

Q. Is that right? A. Yes.

Q. And did Mrs. Bouslog ask any questions of David or did she just let him do the talking?

A. She asked some questions.

Q. Did she ask any questions that your brother hadn't [218] volunteered? A. Yes.

Q. What questions did she ask that your brother didn't volunteer information on?

A. I beg your pardon?

Q. You say that Mrs. Bouslog asked questions, is that right? A. Yes.

Q. And you say that your brother volunteered certain information?

Mr. Anthony: Witness probably doesn't know

(Testimony of Ellen Fuller Cabreros.)

what the word "volunteer" means. Why don't you ask what did Mrs. Bouslog say?

Q. May I ask I be allowed to continue my examination?

Mr. Pratt: Proceed, Mr. Barlow.

Q. You say that Mrs. Bouslog asked certain questions of your brother, is that right?

A. Yes.

Q. And then your brother gave statements that Mrs. Bouslog hadn't asked him about, is that right?

A. Yes.

Q. Now, what statements did your brother give voluntarily, that is, without Mrs. Bouslog asking for any information?

A. He say he did something wrong in the sight of God.

Q. Is that all he said, that is without having been asked specific questions by Mrs. Bouslog?

A. And he say it was a frame-up, he did [219] wrong.

Q. Now, he said all of that and Mrs. Bouslog had not asked him any questions?

A. Yes, I think so. I forgot.

Q. What questions did Mrs. Bouslog ask of your brother and what answer did your brother give, if any answers at all?

A. She asked him what was wrong with him.

Q. What did he say was wrong with him?

A. He said he have something in his chest he wants to bring out.

Q. And what else did she say?

(Testimony of Ellen Fuller Cabreros.)

A. She say what was wrong.

Q. And what did your brother answer?

Mr. Anthony: I think this has already been asked and answered about four times, Mr. Chairman. The witness is a little bit mystified by the repetition, evidently.

Q. May I ask that the witness answer the question?

Mr. Symonds: May we have the question read back?

Mr. Pratt: Read the question.

(Previous question read back.)

Mr. Anthony: It has already been asked about four times.

Q. I beg to differ with Mr. Anthony, Mr. Chairman. I am cross-examining the witness and trying to get out of her what questions Mrs. Bouslog propounded and what answers the [220] brother gave. The witness has yet to say that that is all.

Mr. Anthony: You understand what he is saying to you? He wants you to tell him what Mrs. Bouslog asked and what your brother said, tell it all over again.

Q. I object to Mr. Anthony's characterization, "all over again," because she has not said anything yet on that score.

Mr. Pratt: I think probably, Mrs. Cabreros, if we could have anything else which may have been said, either that she asked or he answered. What you have told us, is there anything else that was

(Testimony of Ellen Fuller Cabreros.)

said? You don't remember anything else but what you've said?

Q. In other words, am I right in stating that Mrs. Bouslog only asked your brother two questions and then your brother did all the talking, is that right?

Mr. Anthony: That's a misstatement of the witness' testimony, Mr. Chairman.

Mr. Pratt: I think he is correct in one respect, Mr. Anthony. She's mentioned two questions that she said Mrs. Bouslog asked. So far, we haven't anything beyond that.

Mr. Symonds: He can frame that question to say those are the only two questions. She said she doesn't remember any other questions. It is a loaded question.

Q. Let the witness testify.

Mr. Pratt: Let's have the question; see if we can get the answer. [221]

(Previous question read back.)

A. I don't remember.

Q. You don't remember Mrs. Bouslog asking your husband more than two questions, is that right, on that occasion? Correct that, your brother. I'll withdraw that. You don't remember Mrs. Bouslog asking more than two questions of your brother on that occasion, is that right? Is that your testimony? A. I think so.

Q. Now, was Mrs. Bouslog there when Dr. Chang came in? A. Yes.

(Testimony of Ellen Fuller Cabreros.)

Q. And did Mrs. Bouslog stay in the room while Dr. Chang examined your brother?

A. No, we all went out.

Q. All of you went out?

A. But my sister-in-law.

Q. But your sister-in-law? A. Yes.

Q. Now, you stated this morning that the walls were thin and you could hear somebody talking on the other side? A. Yes.

Q. Who did you hear talking?

A. My sister-in-law with the doctor and my brother.

Q. You heard your brother talk, too?

A. Yes. [222]

Q. And you heard Dr. Chang speak with your sister—— A. Yes.

Q. In-law?

A. But I know they was talking but I couldn't hear.

Q. You couldn't understand what they were saying? A. Yes.

Q. And then, did you hear your brother talk to Dr. Chang? A. Uh-huh.

Q. And did you hear what your brother said to Dr. Chang? A. Frame-up.

Q. Is that all heard? A. Yes.

Q. Just one word? A. Yes.

Q. You didn't hear your brother say any other word other than the word "frame-up"?

A. Yes.

Q. While you were outside? A. Yes.

(Testimony of Ellen Fuller Cabreros.)

Q. And would you state that he said that in a whisper or that he said it in a loud tone?

A. Louder than a whisper.

Q. What's that?

Mr. Pratt: Louder than a whisper, she said.

Q. May I beg the indulgence of the Committee for a moment? Now, Mrs. Cabreros, when you heard your brother say to [223] Dr. Chang that it was a frame-up as you just testified, were you inside the bedroom with your brother and the doctor or were you outside?

A. Outside in the parlor.

Q. Now, Mrs. Cabreros, you remember signing this affidavit you just looked at, is that right?

A. Yes.

Q. And in this affidavit, you made this statement: "After Attorney Bouslog sat with my brother for a short time in my presence, and in the presence of Mrs. Fuller, a Dr. Chang arrived to see my brother. When Dr. Chang came into the bedroom, I was present and he asked my sister, his wife, Mrs. Fuller, what was the trouble with Mr. Fuller, and my sister-in-law, Mrs. Fuller, explained that he had been ill since the verdict in the Smith Act trial because he thought it was a frame-up. I heard my brother tell the doctor it was a frame-up and then you see I left the room during the time my brother was being examined by the doctor." And now, when did you hear the word "frame-up," while you were in the room or outside?

A. I think I was outside.

(Testimony of Ellen Fuller Cabreros.)

Q. You think now that you were outside but you are not sure?

Mr. Anthony: Just a minute. The witness has consistently stated she was outside. Stated this morning the door was open and she heard her brother. [224] She was on the sofa outside and nothing inconsistent in her affidavit.

Q. I ask the Committee to look at the affidavit and ask the Committee if there is anything inconsistent.

Mr. Pratt: The statement that I remember, Mr. Anthony indicates a statement was made while she was in the room.

Mr. Anthony: No, no. That's the trouble with Mr. Barlow. He didn't read the——

Q. I read the whole paragraph, may it please the Committee.

Mr. Anthony: "I left the room during the time my brother was being examined by the doctor."

The Chairman: That's correct, but that statement that he read——

Q. That's a hang-over.

Mr. Anthony: Well, so what?

Q. So let's——

The Chairman: He's entitled to ask the question, Mr. Anthony.

Mr. Anthony: I think the witness should be, ought to be handed her affidavit and interrogated from that rather than Mr. Barlow's paraphrasing.

Q. I don't think we should go by Mr. Anthony's rules.

(Testimony of Ellen Fuller Cabreros.)

Mr. Chairman: Will you read the question?

Mr. Anthony: The witness is being interrogated about a written statement and I think she is entitled to have it before her when she is interrogated.

Mr. Chairman: Let's see; apparently there [225] is now no question before us. The question was asked and answered.

Mr. Anthony: No question in the mind of the withness as to where she was.

Q. I don't think it is important as to what question is in Mr. Anthony's mind. We're interested in developing the facts as to whether or not she was——

Mr. Anthony: Can't we get on with the examination, Mr. Chairman?

Mr. Chairman: You have further questions on that point, Mr. Barlow?

Q. Well, she has not answered.

Mr. Anthony: The chair has ruled she answered.

Mr. Chairman: I would suggest, Mr. Barlow, that you use Exhibit B, and show her the question you read to her because she may not have understood what you read. Here's the exhibit. You read to her the portion you read, Mr. Barlow. Ask the question now, Mr. Barlow, of the witness.

Q. Mrs. Cabreros, where were you when you heard Dr. Chang examine your brother, and you heard the statement "frame-up" by your brother? Where were you physically located? Were you in

(Testimony of Ellen Fuller Cabreros.)

the bedroom or where were you? Were you outside? A. In the parlor.

Q. You were in the parlor? A. Yes. [226]

Q. So that you were not in the bedroom when your brother used the word "frame-up"?

A. He was being examined, I was outside.

Q. That was during the examination that you heard your brother use the word "frame-up." Did you hear what Dr. Chang asked him? (No response.) And the only word that you heard come out of that room was when the doctor was in there, was that your brother used one word, "frame-up." You didn't hear anything else, any sound come out of that room other than that? A. No.

Q. And your brother made that sound, is that right? A. Yes.

Q. Now, when you signed this affidavit, did you understand what you were signing? A. Yes.

Q. Did you understand that last sentence? You mean that you were outside when your brother was using the word "frame-up"? A. Yes.

Q. You didn't feel that that sentence meant that you were in the examining room?

A. No, not when he was examined.

Q. How carefully did you read that affidavit before you signed it?

A. I read it enough to understand.

Q. You read it enough to understand?

A. Yes. [227]

Q. Did Mrs. Bouslog explain to you about the affidavit? A. No.

(Testimony of Ellen Fuller Cabreros.)

Q. And you understood everything in that affidavit that you read, is that right? A. Yes.

Q. Is that right? A. Yes.

Q. Now, after the doctor left, what happened?

A. We went back in the room.

Q. When you say "we," will you tell the Committee who you mean by "we"?

A. Harriet Bouslog, my sister-in-law and myself went back in the bedroom.

Q. And then what happened?

A. With my girl friend, too.

Q. And then what happened? Did your brother and Harriet engage in a, withdraw that. Did your brother and Mrs. Bouslog engage in a conversation then?

A. No, she told my sister, "I think it's enough. He should rest now."

Q. Mrs. Bouslog told your sister that it was enough, that your brother should rest?

A. Yes.

Q. Then what happened?

A. He looks like he needs a rest.

Q. What is that?

A. He looks like he needs a rest. [228]

Q. And then what happened?

A. That's all. Harriet Bouslog asked my brother if he wanted anything else, he wanted something, he said yes. He wanted to sit down. She made him sit up, and asked him if he wanted a drink of water and she told my sister-in-law to get some water.

(Testimony of Ellen Fuller Cabreros.)

She bring the spoon and fed. She also gave him a cigarette, too.

Q. Well, did she, is that all that happened? Was there any conversation?

A. She told him that we are going now, we are leaving, if you wanted anybody, if he wanted to talk to anybody else.

Q. Well? A. He said yes.

Q. Who did he want to talk to?

A. Wanted to talk to Jack Hall.

Q. Did your brother suggest Jack Hall or did Harriet Bouslog suggest Jack Hall?

A. He did.

Q. What's that?

A. He said anybody, anytime.

Q. Who suggested the name, Jack Hall? Did your brother say, "I want to talk to anybody, anytime," and that means Jack Hall, or did Harriet Bouslog say, you want to talk to anybody, I'll bring Jack Hall? How did Jack Hall come into the picture? A. She asked if he wanted to—— [229]

Q. Mrs. Bouslog asked your brother if he wanted to talk to Jack Hall? Just tell the Committee who injected or who brought the name of Jack Hall up? Did your brother think of it at first or did Mrs. Bouslog think of it first?

A. He wanted to talk to Jack Hall.

Q. Oh, it was your brother that mentioned Jack Hall's name and your brother said I want to talk to Jack Hall, is that right?

(Testimony of Ellen Fuller Cabreros.)

A. No, we asked him if he wanted to talk to Jack Hall, me and Harriet Bouslog.

Q. Both of you together? A. Uh-huh.

Q. You and Mrs. Bouslog asked? A. Yes.

Q. If he wanted to talk to Jack Hall?

A. Yes.

Q. And you asked that at the same time?

A. No.

Q. Did you ask him first or did Mrs. Bouslog ask first? A. I asked him first.

Q. Why did you think of Jack Hall at that time? What made you think of Jack Hall?

A. Because I think in the early part he was saying that he did something wrong and he is afraid he might lose his job and all that.

Q. And you thought of Jack Hall?

A. Yes. [230]

Q. In what way could Jack Hall make him lose his job? A. Not Jack Hall.

Q. What's that?

A. He said he might lose his job if you know.

Q. And then you thought of Jack Hall?

A. Yes.

Q. And why did you think of Jack Hall?

A. Because through the conversation he had he was saying that they are good people.

Q. When he said, "they are good people," you immediately thought of Jack Hall? A. Yes.

Q. Well, there were six other people in the case, is that right? You remember that? Six other defendants? A. Yes.

(Testimony of Ellen Fuller Cabreros.)

Q. You didn't think of any one of the six others, just Jack Hall? A. Uh-huh.

Q. So when your brother said that they were all good people, the only person you could think of, that came into that category was Jack Hall?

A. Yes.

Q. And that is why you suggested that Jack Hall come and talk to your brother, is that right?

A. Yes.

Q. You don't know why Mrs. Bouslog suggested Jack Hall? A. No. [231]

Q. Didn't it seem strange to you that both of you should think of the same man as being the person that your brother should talk to?

Mr. Anthony: This is just argumentative, Mr. Chairman. You want to argue the question, I can answer it for Mr. Barlow.

Mr. Chairman: I think you might get the answer. I think probably Mr. Barlow, if Mr. Barlow exhausted this——

Q. I would like to get an answer from the witness unless the chair rules she doesn't have to answer.

Mr. Chairman: I said she might have this answer, but I think it is just about as far as we have gone on this line of questioning. That's my opinion. You read the question, please.

(Previous question read back.)

(A recess was taken at this time.)

(Testimony of Ellen Fuller Cabreros.)

Mr. Chairman: You can go ahead with the examination.

Q. Now, Mrs. Cabreros, the time that Dr. Chang left the room, and you and Mrs. Bouslog and the rest of the people went back, what conversation did Mrs. Bouslog have with your brother?

Mr. Anthony: That's already been asked and answered at great length, if the Chairman please.

Q. May I ask the question be answered?

Mr. Anthony: There is an objection before the [232] Committee.

Mr. Chairman: I am not too certain that—Is this the second time when they went back when the drink of water was——

Q. I am asking her in this question exactly what conversation transpired between David and Mrs. Bouslog after the doctor, after Dr. Chang had left?

Mr. Chairman: I don't think she answered that on cross-examination, Mr. Anthony.

Mr. Anthony: That's the incident about the water.

Mr. Chairman: Yes, but we haven't got conversation yet. He had a drink of water but he is now asking if there was any conversation, and I think we should have an answer. Will you answer the question? Do you understand what he's asked you?

A. I forgot.

Q. I'll try to rephrase it. Dr. Chang leaves the room, is that right? A. Yes.

Q. Then you and Mrs. Bouslog and the rest of

(Testimony of Ellen Fuller Cabreros.)

the people that were there, as you testified, came back into your brother's room, is that right?

A. Uh huh.

Q. And there was some testimony about Mrs. Bouslog asking Mrs. Fuller for some water and your brother getting a spoonful of water or something like that, is that right? [233] A. Yes.

Q. Now, after Dr. Chang left, up to the time that Mrs. Bouslog and you and Grace and the rest of you went outside the room, leaving your brother David alone, what conversation transpired between your brother and Mrs. Bouslog?

A. I answered that. I think I answered that.

Mr. Anthony: I know you have but he wants it again.

A. She asked my brother if he wanted to see, wanted to see anybody else.

Q. Is that the only conversation that was had at that time?

A. Told him that she was going and that he should rest.

Q. Let me get this straight. You say that when Dr. Chang walked out of the room, and you and Mrs. Bouslog and the rest of the people walked back in again, that the only conversation, that is words between Mrs. Bouslog and your brother was, when Mrs. Bouslog asked if he wanted to see anybody and you and Mrs. Bouslog said, "You want to see Jack Hall." Now, was anything else said during that period of time? Was anything else said or is that all?

(Testimony of Ellen Fuller Cabreros.)

A. He said he wanted to see Jack Hall and anybody.

Q. But that's all he said, and that's all Mrs. Bouslog said? A. Yes (nod of head.) [234]

Q. Now, do you remember this morning saying that he wanted a drink of water, that he sat up, and Mrs. Bouslog gave him the water, he started to mumble again?

A. It was clear that all people——

Q. Well, good. He did something wrong in the sight of God, it's a frameup. Now, did he say that then, too?

A. Yes, I think was after he drink the water he started to talk about that.

Q. So that after he drank the water, he started to talk? A. Yes.

Q. And he did say more than the fact that he wanted to see Jack Hall, is that right?

A. Yes.

Q. He did say that there was something, that he did something wrong in the sight of God, that it was a frame-up? A. Yes.

Q. So that you were in error before when you said that was all he said when you testified that Mrs. Bouslog said he wanted to see Jack Hall, is that right?

Mr. Anthony: Error in this. She testified, it was made clear to the witness they didn't want to hear the conversation about the water.

Q. I don't know who made it clear.

(Testimony of Ellen Fuller Cabreros.)

Mr. Anthony: You did. At least the Chairman did, he said that was about the water.

Q. I have a right, may it please the Chair, to show the inconsistencies of her statements. On direct [235] examination she said that——

Mr. Anthony: Well, I'll withdraw the objection. Go ahead and ask the question.

Mr. Chairman: I think he's entitled to get that. Will you repeat the question, please?

(Previous question read back.)

A. I think so. I don't know, I forgot.

Q. You think of it.

Mr. Anthony: She said, I think so, I've forgotten.

Q. Which is the truth? The statement you first made when Mr. Anthony asked you the question or is it the statement you made to me, which is the truth? A. The first one.

Q. What is that? A. This morning.

Q. The first one? A. Yes.

Q. So that the statement you made to me isn't true, is that right?

A. It's almost the same, I think.

Q. Almost but not quite. Which is the true statement? A. This morning.

Q. This morning's statement? A. Yes.

Q. This afternoon's statement wasn't true?

Mr. Anthony: I don't think the witness knows [236] what the question is. I mean, he is not confronting her, he is not being fair with this wit-

(Testimony of Ellen Fuller Cabreros.)

ness. I find no inconsistency in anything she said.

Q. I don't think——

Mr. Anthony: You ask her a point blank question. Don't say——

Mr. Chairman: He already asked that, Garner. He read it from his notes as best he had it down and asked whether that was a correct statement or the statement she made, just made to us that the conversation was the question concerning Jack Hall——

Mr. Anthony: She never testified to that either this morning or this afternoon.

Mr. Chairman: I think that you're incorrect there. This afternoon several times, Mr. Barlow asked if there was anything else said after the doctor left beside the question as to whether or not he wanted to see Jack Hall and it seems to me she answered that several times. The effect was that that was all that was said. Then Mr. Barlow called her attention to the fact that this morning she had referred to several other things, that he had done something wrong, that he wanted to confess, that they were all good people, and that he wanted to see Jack Hall.

Mr. Anthony: That is right. Now she's testified to that so where are we going from here on.

Mr. Chairman: He was trying to see whether this morning's testimony to his question was correct or the other. I think it was asked and answered and I don't think we can get any further.

Q. I don't intend to ask anything further.

(Testimony of Ellen Fuller Cabreros.)

Mr. Chairman: Let's proceed with the witness.

Q. Now, the second was, when was that?

A. The next day, on Saturday.

Q. Who came with you, if anybody?

A. I didn't go there.

Q. You didn't go there?

A. I went there when they was leaving, I went there late.

Q. You went there late? A. Uh huh.

Q. You say you got there when they were leaving. Explain to the Committee what you mean when you say you got there when they were leaving?

A. When they were leaving.

Q. When they were leaving?

A. I got there when couple of minutes before they were going and told my brother they was going and we'll see you later and my brother stood up, they all told him good-bye. I just came in and they was leaving. They told him good-bye, we're leaving so he said don't leave and started to say don't leave, he was in the parlor sitting down. [238]

Q. Were you inside the house when they were getting ready to leave or——

A. I came in through the door.

Q. You came in through the door?

A. Yes.

Q. And Mrs. Bouslog, Jack Hall, and your brother and several other people were sitting in the living room, is that right? A. Yes.

Q. When you walked in the door?

A. Yes.

(Testimony of Ellen Fuller Cabreros.)

Q. And you say that they were getting ready to leave? A. Yes.

Q. Right? A. Yes.

Q. Now, what gave you the impression that they were getting ready to leave?

A. Because they were standing up.

Q. They were standing up? A. Yes.

Q. And by they, you mean who?

A. Harriet and Jack Hall.

Q. They were standing up? A. Yes.

Q. And was any conversation had?

A. I don't know, I wasn't there.

Q. Well——

A. Only when they said, good-bye, we're leaving now. [239]

Q. In other words, the only thing that transpired in your presence after you got inside the door was that Mr. Hall and Mrs. Bouslog were standing there and they said what?

A. We are going, they were leaving.

Q. We are going, we are leaving now. Was anything else said, anything else done?

A. My brother told them not to leave, don't leave.

Q. And what else happened? Did anybody else say anything?

A. That's all. Jack Hall tried to make him understand that they were leaving, they were taking him to the room, tell him to go and rest.

Q. How much time would you say elapsed between the time you came in and Mr. Hall and Mrs.

(Testimony of Ellen Fuller Cabreros.)

Bouslog left? A. I don't know.

Mr. Anthony: You what? Speak up.

Mr. Chairman: She said she didn't know. Mrs. Cabreros, can you tell us how long it was that you were there from the time you got there until Mr. Hall and Mrs. Bouslog left? How long was it? Was it two minutes, ten minutes or half an hour or what?

A. It was about 10 minutes or more.

Mr. Chairman: 10 minutes, about 10 minutes?

A. Or more.

Q. Mrs. Cabreros, I just have one more, two more questions. [240] On this first night that Mrs. Bouslog and you were in your brother's house, in the bedroom, and you heard your brother say a lot of things, was your brother talking loud enough for Mrs. Bouslog to hear everything that he said?

A. Yes.

Q. In other words, it isn't possible that your brother and you were talking and having a conversation and Mrs. Bouslog didn't hear it?

A. I don't think so.

Q. She heard everything you heard your brother say on that first visit, is that right? A. Yes.

Q. May I have the affidavit that was submitted? Now, Mrs. Cabreros, I ask you to read Page 3 of Mrs. Bouslog's affidavit, this first paragraph.

Mrs. Bouslog: Which paragraph?

Q. First paragraph on Page 3.

Mr. Anthony: I don't see what that has to do with this witness. He handed the witness an affidavit by Harriet Bouslog.

(Testimony of Ellen Fuller Cabreros.)

Mr. Chairman: We haven't seen it, Mr. Anthony. If there is an objection, if you want to state your objection, we will hear it.

Mr. Anthony: No objection, but we are not getting very far on this.

Mr. Chairman: Is this conversation one in, [241] is this covering a conversation in which Mrs. Cabreros was present or purported to be?

Q. That is right, sir.

Mr. Chairman: I think we're entitled to have it. What is your question now. She read the paragraph.

Q. Have you read the affidavit? That's an affidavit, that's Mrs. Bouslog's affidavit, not yours. Mrs. Bouslog in here refers to the word "frame-up" in that paragraph. That was used in here.

A. No.

Q. Would you say that all the events that occurred in the room at that time are contained in this paragraph in this affidavit?

Mr. Anthony: I object to that. Now, here is an affidavit by one witness, by one person and there have been four or five witnesses that have been in that room. How could this witness say she was not there all the time herself. She doesn't know what the doctor said, for instance. It is not——

Q. May I be heard?

Mr. Chairman: I think you might pin your question down a little bit, Mr. Barlow. I think the question is a little broad.

Q. I asked her, I asked the witness if after

(Testimony of Ellen Fuller Cabreros.)

reading this paragraph, Mrs. Bouslog's affidavit which purports to contain what transpired in the room during this witness' presence with Mrs. Bouslog, and I ask this witness [242] if after reading that affidavit, Mrs. Bouslog had recited everything that happened in the room during that period of time?

Mr. Pratt: Well, if you confine it to the time she was there, I think you'll be all right.

Q. Well, she's already testified after Dr. Chang left she went back into the room.

Mr. Anthony: This sentence that he handed the witness doesn't purport to be everything that happened. What the witness has got to do to answer this question is to meticulously read this affidavit, not one sentence out of it, but read the whole thing.

Q. All the Committee has to do is read the affidavit.

Mr. Anthony: The witness has not read the affidavit in toto.

Q. Let her read it.

Mr. Symonds: This is an attempt to entrap the witness. The witness said what transpired in the room. What Mr. Barlow wants her to do is show a paragraph, ask her to read it, and if she said that's all, then he'll say you told a minute ago that wasn't all.

Mr. Anthony: Aren't you trying to be fair here?

Q. I am trying to be.

Mr. Pratt: Let's have a little order here. I think Mr. Barlow, we better confine our question to what

(Testimony of Ellen Fuller Cabreros.)

she knows and confine it to the time she was there.

Q. That is what I'm trying to do, may it please the [243] Chair. I ask that the Chair take time out to read it and, the part I have marked out is the part that Mrs. Bouslog said what transpired.

Mr. Symonds: Mrs. Bouslog doesn't say that's all.

Q. I am asking the witness.

Mr. Anthony: The witness has testified——

Mr. Pratt: Let's have the witness answer the question. She's already testified what she heard. Mr. Anthony, let's have her answer.

Mr. Dodge: May I call the Committee and counsel's attention to the last paragraph of Mrs. Helen Cabreros', I have read the affidavit of Harriet Bouslog and Jack Hall and insofar as they tell about things that happened in my presence——

Mr. Anthony: That is correct.

Q. Now, I'm trying to show that it is not so.

Mr. Anthony: Omission by Mrs. Bouslog does not, would not prove this witness was not telling the truth or Mrs. Bouslog is not telling the truth. She said certain things did take place. He is not asking, did this take place. He is asking, is this everything that took place?

Q. I'm asking the witness when she signed the statement and that she read the affidavit of Mrs. Bouslog, she incorporated Mrs. Bouslog's affidavit as her own. [244]

Mr. Symonds: But not everything that took place.

(Testimony of Grace Oshiro.)

A. I will say about once, as far as I can remember.

Q. And did Mr. Fuller answer?

A. He nodded his head.

Q. You testified that he looked like a ghost when you saw him. Did you feel that Mr. Fuller was sick?

A. Well, he looks different than usual. I have seen him before, previous to that, and he didn't look that bad [258] to me.

Q. When did you see him prior to this time that you saw him at the house?

A. Well, he passed his mother's house, because he parked his car in the garage by the front by Dillingham, and he walks in between the sidewalk, and I was at her mother's and I could see him just outside walking, because he parked his car right in the front yard.

Q. So the day you got there he looked like a ghost, is that right?

A. To me he looked like a ghost, because I have seen him better than that.

Q. Did you have any conversation with him on that day, you yourself personally?

A. Mr. Fuller?

Q. Yes. A. No.

Q. Did you say anything to him? A. No.

Q. Was there any reason why you didn't talk to him?

A. Well, I felt like it was none of my business. I didn't want to bother them.

(Testimony of Grace Oshiro.)

Q. What did you feel was none of your business?

A. Because that wasn't my own brother, and I didn't want to interfere with other people's things.

Q. You just said you felt it was none of your business. What did you feel was none of your business?

A. Like talking to him or listening to what they were [259] saying.

Q. If you didn't feel that it was any of your business to talk to him, why did you go to his home?

A. Because my girl friend asked me. I usually go with her when she goes some place.

Q. Did you feel when you saw Mr. Fuller in this ghost-like condition that you could talk to him intelligently? A. That I don't know.

Q. Do you feel that you could carry on a normal conversation with Mr. Fuller the day that you saw him in this ghost-like condition?

A. I wouldn't be able to answer that. I don't know him that well.

Q. Well, you were there, and you saw Mr. Fuller, and you said that he looked like a ghost. Now, do you feel that you could carry on a normal conversation with him?

Mr. Anthony: It is already asked and answered.

A. I wouldn't know, because I don't know him that well. I haven't talked to him before that.

Mr. Barlow: I respectfully submit to the Chairman that the witness is evasive.

Chairman Pratt: She perhaps doesn't know

(Testimony of Grace Oshiro.)

what you mean by a normal conversation, Mr. Barlow. Perhaps you could elaborate on that.

Q. (By Mr. Barlow): Do you feel, Miss Oshiro, that Mr. Fuller was well enough to engage in a conversation like [260] you and I are talking now, intelligently, normally, rationally, and any other way? A. I don't know.

Q. Let me ask you this: Do you feel that he was normal that day?

Chairman Pratt: Will you answer that question, Miss Oshiro?

Mr. Symonds: What are you referring to, physically or mentally?

Mr. Barlow: If the witness doesn't understand she can say she doesn't understand.

Chairman Pratt: Do you understand what Mr. Barlow asked you?

The Witness: No.

Chairman Pratt: Read the question.

(The question was read by the reporter.)

Q. (By Mr. Barlow): Do you feel that Mr. Fuller was normal mentally that day? Maybe I can simplify it. Mr. Afook, tell me what the Hawaiian word is. Do you feel that he was somewhat pupule that day when you were there? A. No. No.

Q. Do you feel that he could carry on a normal conversation with anybody? A. Yes.

Q. Now, you stated before, Miss Oshiro, that Mr. Fuller said "Frame-up" in a rather loud voice.

A. Than what he was talking. [261]

(Testimony of Grace Oshiro.)

Q. What is that?

A. What he had been talking, a little louder than.

Q. A little louder than what was his normal tone of voice? A. That you could hear him.

Q. What is that? A. You could hear him.

Q. You could hear him?

A. If he was close enough.

Q. His normal tone of voice was that you could hear him, is that right?

A. If you were close enough.

Q. Well, were you ever close enough to him when you were walking in and out of the room to hear him say any words but the word "Frame-up"?

A. I could hear him.

Q. You could hear him?

A. Sometimes; some parts.

Q. What else did he say besides frame-up?

A. About seeing—when she was asking if he wanted to see Jack Hall.

Q. And he said yes?

A. He nodded his head.

Q. He nodded his head yes or no?

A. He did like that (indicating.)

Q. But he didn't answer?

A. He said yes.

Q. He did say yes, and he nodded his head yes? [262]

Questions by Mr. Peters:

Q. Who did he say "Frame-up" to? Who was he talking to? A. That time I heard him?

(Testimony of Ellen Fuller Cabreros.)

Q. Why not? She said everything that happened in my presence is in that affidavit.

Mr. Anthony: No, she does not.

Q. What does she say?

Mr. Symonds: Those things happened.

Mr. Pratt: I think Mr. Barlow that the question isn't going to prove anything even if she answers, and if she says no or she says yes——

Q. Maybe she doesn't want to answer.

Mr. Pratt: Let's proceed. I don't think we will get anywhere even if she answers it.

Q. Mrs. Cabreros, do you understand every word that's contained in that affidavit?

Mr. Pratt: Her own, Mr. Barlow?

Q. In your own affidavit? A. I think so.

Q. You understand each and every word?

Mr. Anthony: She said I think so.

A. I think so, I understand it.

Q. We have no further questions.

Mr. Anthony: I have no further questions.

Mr. Peters: Where is your brother working?

A. He is a guard.

Mr. Peters: Guard where?

A. He guards the piers. [245]

Mr. Peters: Guards the piers?

A. I think it is Lewers and Cooke.

Mr. Peters: Who does he work for?

A. Castle and Cooke Terminals.

Mr. Peters: He is qualified to join the I.L.W.U.? A. No.

(Testimony of Ellen Fuller Cabreros.)

Mr. Peters: What's the matter, lack of a dollar or what?

A. They are not qualified, they are not covered under the bargaining unit.

Mr. Peters: They don't come under the——

Mr. Anthony: Not covered under the bargaining unit. You understand what those words mean, not covered under the bargaining unit?

A. Yes.

Mr. Pratt: Any further questions? You have any others, Mr. Symonds?

Mr. Dodge: She was asked if she was interrogated by the F.B.I. I don't remember the answer.

Mr. Anthony: She said no, interrogated by nobody.

Mr. Pratt: Neither F.B.I., Afook or the U. S. Attorney's Office. Any other questions of the Committee? You may be excused, Mrs. Cabreros. We'll adjourn till 9 o'clock tomorrow morning. [246]

Mr. Anthony: We will be able to finish, I would estimate, Mr. Chairman, by 10:30.

Reporter's Certificate

I hereby certify that the foregoing is a full, true and correct transcript of my shorthand notes taken in the above-entitled matter on Thursday, December 2, 1954, in the Supreme Court of the Territory of Hawaii.

/s/ AILEEN M. NAKAYAMA,
Official Shorthand Reporter.

December 3, 1954

(The parties being present, together with counsel, proceedings were resumed as follows.)

GRACE OSHIRO

called as a witness on behalf of the Licensee, being first duly sworn, was examined and testified as follows:

Chairman Pratt: Please state your name.
The Witness: Grace Oshiro.

Direct Examination

By Mr. Anthony:

Q. How old are you, Grace?
A. Twenty-five.
Q. Where were you born?
A. Waipahu, Oahu.
Q. You have lived all your life in the Territory of Hawaii? A. Yes.
Q. Are you married or single? A. Single.
Q. Are you employed? A. Yes.
Q. Where do you work?
A. Libby, McNeil & Libby.
Q. What is your job with Libby?
A. Grader-packer.
Q. Grader-packer? A. Yes. [250]
Q. How long have you worked there?
A. Say about six or seven years.
Q. And you are presently employed there?
A. Yes.
Q. Are you a member of the union?

(Testimony of Grace Oshiro.)

A. Yes.

Q. Are you a shop steward, too?

A. Yes, just a steward.

Q. Steward. Miss Oshiro, do you have a recollection of an incident which occurred after the rendering of the verdict in the Smith Act trial here in Honolulu in which you went out to the home of David Fuller? A. Yes, but not all of it.

Q. Not all of it. Well now, will you tell this Committee to the best of your recollection how you happened to go out there and what you observed and heard on that occasion?

A. Well, I went with my girl friend.

Q. Who is your girl friend, Grace?

A. Mrs. Cabreros.

Q. She works for Libby, too?

A. Yes. She and I went up to her mother's house that day, and the mother told her her brother was ill, so she figured that was her brother, so she wanted to go and see him, so she told me, "Let's go over," because it was on the same adjoining lot. So we went over to the brother's house, but I didn't want to go in because I was afraid that I would be thrown out, because she is known to be a trouble-maker, such as people talk about her. She don't get along [251] with the daughter and all the people around there, so I don't want to go in.

Q. Who are you referring to now?

A. Mrs. Fuller; so I didn't want to go in, so I went to her sister's house on this side of the street.

Q. Do you know the sister?

(Testimony of Grace Oshiro.)

A. Not too well, because I go up there and talk to her now and then.

Q. Then what happened?

A. I went there, and I told her to go in first, and if she can get in she will call me later on, so I went to the sister's house, and we were talking; and she went in and I heard her climbing up the steps. I could hear her, she is big. So she asked the sister if she could see her brother, but I didn't know what took place after that because they weren't talking so loud.

Q. Did you later come over to the Fuller's house? A. Yes.

Q. At whose request did you go over there?

A. Ellen, I mean Mrs. Cabreros, called me from the steps.

Q. Then you came over and went in the house?

A. Yes.

Q. Tell the Committee what happened after you went in the house.

A. I went in the house and I think went in the bedroom, and he was laying down on the bed.

Q. Who else was with you? [252]

A. There was myself and Mrs. Cabreros and Mrs. Bouslog and Mrs. Fuller.

Q. Was the daughter of Mrs. Fuller there?

A. She was there.

Q. Did she go in the room too, do you remember? A. She went in. She was in there.

Q. What happened after you went in the room?

A. He was on the bed lying down, and he was

(Testimony of Grace Oshiro.)

real white just like a ghost. I was by the doorway to the hallway. They have a hallway to the living room door and the bathroom, and I was by the door, see, so I cannot remember much about what went on because most of the time I was in and out.

Q. In and out the door? A. Yes.

Q. Could you hear anything that Mr. Fuller said or anything that Mrs. Bouslog said, or anybody else?

A. The part I could remember is the part where he asked for a glass of water or something.

Q. Were you there when the glass of water was brought to him? A. Yes.

Q. Did you hear Mrs. Bouslog ask him anything?

A. Gee, that I'm not positive. I had been walking around, and I didn't pay attention because I figured that was none of my business too. [253]

Q. Did you hear anything that Mr. Fuller said, anything at all?

A. I would have to think. The only part I remember is about the water.

Q. Were you there when the doctor arrived?

A. Yes.

Q. And what did the doctor do, to the best of your recollection?

A. He went in the room, and he was standing there.

Q. Was there anyone else in the room at the time?

A. While the examination was going on?

(Testimony of Grace Oshiro.)

Q. Yes. A. No.

Q. Could you hear any conversation that was going on in the room when the doctor was examining Mr. Fuller?

A. He asked him what was wrong with him.

Q. Did you hear Mr. Fuller say anything?

A. No, I don't remember that.

Q. Did you have any conversation with Mrs. Fuller?

A. I wasn't talking to her most of the time. I didn't talk to her so much.

Q. Grace, now at any time while you were in the Fuller house did you hear Mr. Fuller say anything at all? A. I heard him say "Frameup."

Q. Where were you then?

A. I was in the hall.

Q. Was anybody else in the room with him? [254] A. That I don't remember.

Mr. Anthony: No further questions.

Cross-Examination

By Mr. Barlow:

Q. Miss Oshiro, could you tell this Committee why when Mr. Anthony first asked you if you heard any conversation between Mrs. Bouslog and David, or any talk between them at all you said that the only thing you remembered was that he asked for water, and now you say that you heard Mr. Fuller say "Frame-up"?

A. Because it just stands out, because—I don't know, he just kept on saying it.

(Testimony of Grace Oshiro.)

Q. Why didn't it stand out in your mind first when Mr. Anthony asked you if you heard Mr. Fuller say anything?

A. I was just trying to think. It just entered my mind.

Q. You just stated it stood out in your mind. Why didn't you think about it first if it stood out so clearly in your mind?

A. Well, at first I was nervous. I was trying to look at everybody. Well, if your are more relaxed you think better.

Q. So you are sure now that you heard Mr. Fuller say "Frameup"? A. Yes.

Q. Was that in answer to any question put to him by Mrs. Bouslog, or did he just holler "Frame-up"?

A. He just hollered "Frame-up." [255]

Q. And would you say how far away from Mr. Fuller you were when you heard that?

A. I was on the settee on this side by the door.

Q. In the same room?

Mr. Anthony: On the settee by the door.

Q. I am asking in the same room? A. No.

Q. In a different room. In other words, you were in the livingroom? A. Yes.

Q. And he was in the bedroom? A. Yes.

Q. And you were sitting on a settee?

A. Yes.

Q. When you heard this statement?

A. Yes.

Q. And what did you mean in answer to one of

(Testimony of Grace Oshiro.)

Mr. Anthony's questions that you said most of the time you were in and out, walking in the bedroom and the livingroom?

A. I was by the door, close to the door.

Q. Then would you sit down at times and rest?

A. No, I just was standing over there.

Q. When you heard Mr. Fuller use the word "frame-up" were you sitting or standing?

A. Standing.

Q. So you weren't sitting on the settee?

A. No—I mean in the—oh, you are talking about the [256] settee. I thought you were referring to where I was in the room. On the settee I was sitting down.

Q. Well, I am trying to find out when you heard Mr. Fuller use the word "Frame-up" were you walking in and out, or were you sitting on the settee? A. I was in the parlor sitting.

Q. You were in the parlor sitting, so that was one of the times that you weren't walking in and out? A. Yes.

Q. And all you heard was Mr. Fuller yell "Frame-up"?

A. No, he talked a little louder than usual, not yelling exactly.

Q. In what manner did he speak? Indicate to the Committee by your tone about how loud his time was. A. It's hard to judge.

Q. Well, you heard the voice. Speak as softly or as loudly as he spoke that day and use the word "Frame-up." A. Frame-up.

(Testimony of Grace Oshiro.)

Q. And you were sitting in the livingroom when you heard that word? A. Yes.

Q. And you didn't hear anything else?

A. No.

Q. You didn't hear Mrs. Bouslog use any words of any kind? A. No.

Q. You didn't hear her say anything to him? [257] A. No.

Q. Did you hear her ask him any questions of any kind?

A. You mean in the room? When I was in the room?

Q. That's right, while you were walking in and out of the room did you hear Mrs. Bouslog ask Mr. Fuller any questions of any kind?

A. I think I heard something about seeing Jack Hall.

Q. Was Mrs. Bouslog asking Mr. Fuller if he wanted to see Jack Hall, or was Mr. Fuller asking Mrs. Bouslog to see Jack Hall? Which was it?

A. Mrs. Bouslog.

Q. She was asking Mr. Fuller? A. Yes.

Q. And that was while you were going in and out. Now, while you were in the room for a short period of time did you hear Mrs. Bouslog ask Mr. Fuller any questions? A. Just that.

Q. Just the same question?

A. The same, something about "Would you like to see Jack Hall?"

Q. Did she ask that more than once?

(Testimony of Jack Hall.)

Q. This is the first time right here?

A. That is correct.

Mr. Peters: What is this? He never knew you before?

Mr. Anthony: He never discussed this case with me.

Mr. Peters: Well, he should have. [275]

Q. (By Mr. Anthony): Were you present at the Honokaa speech? A. Yes, I was.

Mr. Peters: You were present where?

The Witness: I assume you were referring to the speech in question in these proceedings.

Q. The speech by Mrs. Bouslog at Honokaa. How was that meeting conducted, Mr. Hall?

A. Well, it was a public meeting and advertised as such in the Honokaa community, and everybody was invited, and it was held in the theater there, and the speakers were on the stage. We had a little music and a few leis and the usual sort of thing for a public gathering, I guess, and we had a chairman and the speakers.

Q. Harriet was the speaker of the occasion?

A. I thought I was, but we were both billed as speakers, as I recall.

Q. Was there anything disorderly in regard to that meeting?

A. Not at all, it was a very orderly meeting.

Q. Did you hear what Mrs. Bouslog said at that meeting?

A. Yes, I did. I was sitting right behind her on the platform when she was speaking.

(Testimony of Jack Hall.)

Q. Were you present in the United States District Court when the interrogation between Mrs. Bouslog and Judge Wiig took place?

A. I was.

Q. Can you tell the Committee to the best of your recollection as to whether or not what Mrs. Bouslog stated [276] was substantially an accurate version of what transpired there?

Mr. Barlow: I objeet to the form of the question.

(Argument by counsel.)

Q. (By Mr. Anthony): Mr. Hall, what we are talking about has been received in evidence as Exhibit D, constituting the transcript of the proceedings on the occasion of December 16, 1952, when Judge Wiig interrogated Mrs. Bouslog with respect to the Honokaa speech. Now I ask your best recollection as the accuracy of the version of that as given by Mrs. Bouslog?

A. Well, at the time of the proceeding in the court on this matter I heard Mrs. Bouslog's summary of her speech, and it was a summary because the speech was much longer, but whatever she stated there, as I recall it, was a correct summary of what she had said.

Q. Have you read the newspaper accounts of that speech, Mr. Hall?

A. I must have read them at the time they came out, but I haven't seen them since.

Q. At the time you read them, were you able to

(Testimony of Jack Hall.)

form any opinion whether or not the newspaper articles were accurate articles as to what transpired at that Honokaa meeting?

A. They definitely were not accurate. Some of the things attributed to Mrs. Bouslog were my statements.

Q. May I have the one from the Hilo Tribune-Herald? You say you haven't read any of these articles? [277]

A. I haven't seen them since the time they were written.

Q. Since the time they were written. I wonder if you would take the time, Mr. Hall, to read the article?

Chairman Pratt: I wonder if perhaps we might take a short recess while he is doing it.

(Recess.)

Chairman Pratt: You may proceed.

Q. (By Mr. Anthony): Have you read that article? A. I have.

Q. Can you point out any item that was erroneously attributed to Mrs. Bouslog?

A. There are two as I see them here and recall them.

Q. Will you read them, please?

A. The first lead paragraph says, "Smith Act trials are aimed at destroying unions and 'must be stopped,' Jack W. Hall and Harriet Bouslog Sawyer asserted here yesterday." I don't recall Harriet making that statement. I certainly did.

(Testimony of Jack Hall.)

Mr. Peters: You certainly did?

The Witness: I did.

Mr. Peters: You say you, as the leader, you set the tempo of that meeting, didn't you?

The Witness: I would certainly say so. The second thing is the paragraph reading as follows: "Mrs. Sawyer, speaking for a half hour, spoke of 'some rather shocking and horrible things that go on at the trial.' " I made that statement, and I was referring to the fact that the judge was overruling a number of defense objections [278] and permitting evidence of a hearsay nature that I had no prior knowledge of, and things of that nature.

Mr. Anthony: No further questions.

Mr. Peters: As far as Mrs. Bouslog is concerned, Brother Anthony has referred to a hearing before Judge Wiig. What type of hearing was that? What was it about?

Mr. Anthony: May I answer that, Judge? After the speech was given the judge quite appropriately, in my opinion, called counsel to the court to interrogate counsel upon that transaction. I should have read that at the time, and perhaps I might do that now so that the Committee will know what we are talking about, with the indulgence of the Chairman. This doesn't have to be recorded. It is in a written document. I am now reading from a portion of the transcript in United States vs. Fujimoto, et al., Criminal 10495.

Chairman Pratt: Mr. Anthony, were you planning to read the whole thing? I don't think it is necessary; the Committee will have it.

(Testimony of Grace Oshiro.)

Q. Yes.

A. He was talking to all of us, and it just came out, the words.

Q. You were out in the livingroom?

A. Yes.

Q. Who was in there when he said "Frame-up"?

A. It was Mrs. Bouslog and my girl friend and his wife.

Q. Were they all talking to him? You ought to know whether they were talking or they weren't talking. A. They were talking.

Q. Or whether he was talking to himself or talking to somebody else; can't you tell us?

A. He was talking.

Q. To whom? A. I don't know.

Q. Well, were the other occupants of the room talking to him or talking among themselves? Why do you hesitate? Why have you got to think?

A. Because I can't remember so much.

Q. Do you think that coming here this morning and looking at the ceiling is going to bring something back that you have forgotten? Why don't you answer the questions one way or the other? If you can't remember, say so.

A. I can't remember. [263]

Questions by Mr. Barlow:

Q. Miss Oshiro, when were you first approached by anybody as to what happened in the room with Mr. Fuller and Mrs. Bouslog?

A. From Eddie Wong.

(Testimony of Grace Oshiro.)

Q. Eddie Wong, who is he?

A. Business agent.

Q. Business agent. When was that?

A. On the last canning day.

Q. The last what?

A. The last canning day, the last day we worked.

Q. When was that? A. Wednesday.

Q. Wednesday, and what did Mr. Wong say to you?

A. He just told us that Mr. Symonds wanted to see us Friday.

Q. Told us, who is us?

A. Me and my girl friend.

Q. Then did you go down and see Mr. Symonds?

A. Yes.

Q. What did Mr. Symonds say to you?

A. He just made us read the affidavits of herself and Harriet and what Mrs. Fuller has stated in the statement.

Q. And what did you say?

A. We told him that was a lie when we were reading that.

Q. Which affidavit did you refer to when you said it [264] was a lie?

A. Mrs. Fuller's statement.

Q. Was that the first time that you had ever talked to Mr. Symonds or Mrs. Bouslog about what happened? A. Yes.

Q. Right after the trial, right after this incident occurred, were you asked by Mrs. Bouslog or Mr. Symonds or anybody, by the ILWU, associated with

(Testimony of Grace Oshiro.)

the ILWU or connected with them or on their behalf to sign an affidavit? A. No.

Q. No one asked you anything at all about this incident until you went down to see Mr. Symonds, is that right? A. Yes.

Q. And did Mr. Symonds tell you what happened that day?

A. What do you mean "Tell me what happened that day?"

Q. Well, you went down to Mr. Symond's office, is that right? A. Yes.

Q. Tell the Committee what happened in Mr. Symonds' office.

Mr. Peters: When was this, Mr. Barlow?

Mr. Anthony: Last Wednesday.

Mr. Symonds: Last Friday.

Mr. Peters: Last Friday.

A. Last Friday we went to his office, about two o'clock we got there, and he made us read that, and he just told us to tell the truth after we read that. [265]

Q. And everything you are telling here today is the truth, as you remember? A. Yes.

Q. What parts of Mrs. Fuller's affidavit do you say is a lie?

A. The part she was referring there that she goes to have lunch with Jack Hall every week.

Chairman Pratt: Have we got an affidavit?

Mr. Anthony: All the witnesses have referred to the signed statement procured by Mr. Afook as an affidavit. It is in fact not an affidavit. Mrs. Fuller

(Testimony of Grace Oshiro.)

said Mrs. Cabreros had lunch every week with—that was her testimony here before this Committee—with Jack Hall. I don't know whether it is in the statement or not. I believe it is.

Q. (By Mr. Barlow): Let me clarify this. What did you see in Mr. Symonds' office that you are referring to as a lie? Is it Mrs. Fuller's affidavit or statement or what? A. Statement.

Q. Statement.

Q. You say that Mr. Symonds had a copy of Mrs. Fuller's statement? A. Yes.

Q. Now you say, Miss Oshiro, that in the statement that you saw in Mr. Symonds' office——

A. Yes.

Q. That Mrs. Fuller had indicated that Ellen Cabreros [266] saw Jack Hall every week?

A. Yes.

Q. Is that what the statement says?

A. I just don't remember all of it, but I know she says something like having lunch with Jack Hall.

Q. Every week?

Mr. Symonds: You are adding on.

Chairman Pratt: He can cross-examine the witness.

(Argument by counsel.)

Chairman Pratt: Let's proceed.

Q. (By Mr. Barlow): When you said "Every week" before, you were mistaken, is that right?

A. Yes.

Q. What else in Mrs. Fuller's statement was a

(Testimony of Grace Oshiro.)

lie that you say everything in there was a lie? What else do you remember was a lie?

Mr. Anthony: I suggest that the witness be handed the statement. Otherwise, she can't reconstruct a three-page letter on the witness stand.

Chairman Pratt: Well, if she doesn't remember, I think that that is the answer to that, Mr. Anthony.

Mr. Anthony: Do you remember what is in that?

Mr. Peters: What is the materiality of what occurred down in Mr. Symonds' office last Friday? Are we going into the question of the veracity of the statement here that isn't in evidence?

Mr. Barlow: We are testing the credibility of the witness. [267]

Mr. Peters: How are you testing it? When you get all through what testimony can be applied to it? The way I understand it, the evidence given here by another witness, the witness on the stand can be questioned relative to it to show a conflict between the two witnesses in relation to the same subject matter, but I can't see the materiality of this woman cataloging as lies the ex parte statement of a former witness on the stand here that we know nothing about.

Mr. Barlow: I have no further questions to ask the witness.

Mr. Anthony: That's all.

Chairman Pratt: That's all, Miss Oshiro.

(Witness excused.)

JACK HALL

called as a witness on behalf of Licensee, being first duly sworn, was examined and testified as follows:

Chairman Pratt: Your name, please?

The Witness: Jack Wayne Hall.

Direct Examination

By Mr. Anthony:

Q. Mr. Hall, you are one of the defendants in The United States of America vs. Fujimoto, et al.?

A. I am.

Q. Criminal number 10495?

A. I am. [268]

Q. You are also the Regional Director of the ILWU? A. That is correct.

Q. Roughly, how long have you been connected with that union?

A. I was Regional Director in execess of ten years.

Q. How long have you lived in the Territory of Hawaii, approximately?

A. About 18 years to 19 years.

Q. Are you married, Mr. Hall? A. I am.

Q. Do you have any children?

A. I have two, a daughter age eleven and a son age five months.

Q. Mr. Hall, do you recall an occasion after the verdict was rendered in the United States vs. Fujimoto, et al., in which you went out to the home of one of the jurors, Mr. David Fuller?

(Testimony of Jack Hall.)

A. I do.

Q. At whose request did you go out there, Mr. Hall?

A. I was told by Mrs. Bouslog that Mr. Fuller wanted to see me.

Q. Can you recall the day of the week it was that you went out there?

A. I am quite certain it was a Saturday.

Q. It was about a week or so after the verdict in the case?

A. I don't recall how many days it was, but a few days after the verdict. [269]

Q. What time of day did you go out there, Mr. Hall?

A. It was shortly after lunch. We had to wait for the law office to close, as I recall it.

Q. You, together with Mrs. Bouslog, went out to the home of this juror, is that right?

A. That is correct.

Q. When you went in the house who were there at that time?

A. Mr. Fuller was there, his wife and a young girl who I understand was his daughter.

Q. Mrs. Bouslog?

A. Mrs. Bouslog. I am not sure whether Mr. Fuller's sister and Miss Oshiro were there at that time. They were sometime during that time, but I am not sure they were there all the time. I couldn't say that.

Q. Now, Mr. Hall, where was the members of

(Testimony of Jack Hall.)

the family, in what part of the house when you went there?

A. They were standing at the kitchen door, which was in the back of the livingroom.

Q. Did you or Mrs. Bouslog have any conversation with Mr. and Mrs. Fuller at that time?

A. I didn't have any conversation with Mrs. Fuller at all. Mrs. Bouslog said hello to her and said a few words to her.

Q. This conversation was in the livingroom or was it in the kitchen?

A. It was in the livingroom.

Q. In the livingroom. Can you give the Committee approximately [270] the time that you were there on this occasion?

A. I think it was around an hour. I didn't look at any watches.

Q. Mr. Hall, I hand you what has been received in evidence as Exhibit B and ask you if you will peruse that. You will find there an affidavit of Ellen Cabreros, an affidavit of Harriet Bouslog and an affidavit signed by yourself. A. Yes.

Q. You have prior to coming into this committee room reviewed that affidavit?

A. I have looked it over a couple of times, yes.

Q. In your affidavit you state that the matters and things that are set forth in the affidavit of Mrs. Bouslog, insofar as you observed and heard them were true? A. That is correct.

Q. Now, will you please tell the Committee without reference to the affidavits your present best rec-

(Testimony of Jack Hall.)

ollection of what transpired when you and Mrs. Bouslog had this conversation in the Fuller home?

A. I am not sure I can remember everything at this late date. I am not as retentive as some of the witnesses in my travels what happened years ago.

Mr. Barlow: May I ask the Chairman to admonish the witness to confine his remarks to the questions asked of him. That comment is entirely uncalled for.

Chairman Pratt: I don't think it is necessary. [271]

The Witness: I will accede to your request.

Mr. Barlow: Thank you.

A. As I recall it, Mrs. Bouslog went into the house first and I waited down below for a moment until she said that I was there to see Mr. Fuller, and I came into the house, and Mr. Fuller was sitting on a wicker chair or settee in the livingroom, as I recall it. And I went over to him and put my hand out, and he just stared at me for a moment, for a few moments, and he finally grabbed my hand and shook it very hard and held on quite awhile. And I told him, "David, nobody is angry with you," or words to that effect; and "We just want you to get well, and if you want to tell us what happened, we would like to get the facts"; and I tried to talk to him a little bit first. He was very quiet. He looked pretty sick to me. He seemed to be very emotionally disturbed. And he seemed to stare quite a bit at a religious picture that was on the wall of the livingroom.

(Testimony of Jack Hall.)

Q. What was that a picture of, Mr. Hall?

A. As I recall it, it was a picture of Jesus, I think with some sheep, if I am not mistaken, or lambs. I know he stared at it quite frequently and repeated words that he had witnessed, or something to that effect.

Q. Did Mrs. Bouslog ask him any questions, Mr. Hall?

A. Yes, she asked him questions, and I asked questions, and she was keeping notes as to what was said.

Q. Do you have a present recollection of the questions that she asked him? [272]

A. I couldn't be sure of all the questions. I know I asked some and we would develop a subject, and she would ask a question concerning it, and I would do the same.

Q. And the conversation centered about what went on in the jury room in the trial of this case, is that correct? A. Not only that.

Q. Not only that?

A. We asked a few questions as to what had gone on in the jury room prior to the case being submitted. Yes, one thing, I recall asking if there had been any discussion about the case as the jury was having its recesses, and whether there had been any discussion about anything that had been printed in the paper during the trial. I think he said, as I recall it, that he hadn't read any newspaper clippings about the trial because the judge had warned

(Testimony of Jack Hall.)

them not to. He didn't know whether anybody else had or not.

Q. Now, did Mrs. Fuller enter into this conversation?

A. No, she didn't discuss anything. She stood in the door most of the time, but some of the time she was in the kitchen by herself.

Q. Did she ever object to your presence in the house? A. No, not at all.

Q. Did Mr. Fuller ever object to your presence there? A. No. He didn't want us to leave.

Q. Now, do you recall anything that happened about the time you went to leave? [273]

A. Well, he asked us to stay on that occasion, and the second occasion we went back, which was the following day, he grabbed me around the leg and I had a hard time getting loose. He was on the floor. We tried to leave and he grabbed me by the leg and hung on and said, "Don't go, don't go."

Q. The second occasion that you went back, Mr. Hall, was that the following day?

A. That was the following day.

Q. Was that in the morning or afternoon?

A. It was after lunch.

Q. What was the occasion of that second visit?

A. On the second visit we came back with Joseph Kealalio who was then president of the Longshore Union. We brought him back with us because apparently he knew David fairly well from association on the waterfront, and he wanted David to understand from somebody like Joe that the longshoremen weren't angry about his role in the ver-

(Testimony of Jack Hall.)

dict and he shouldn't be afraid of coming back to the job, and he should hurry up and get well.

Q. Did Joe have anything to say at that second occasion that you recall?

A. Joe just said pretty much, "Hello, David, how are you?" And that sort of thing.

Q. By the way, did you ever know Mr. Fuller before the trial in the Smith Act case?

A. No, I did not. [274]

Q. Mr. Hall, you have read the affidavit of Mrs. Bouslog and the affidavit of Ellen Cabreros. I want you to tell the Committee whether or not the matters and things so far as you heard and observed them set forth in those affidavits are true?

A. They are, because I went over the affidavit when it was prepared with Mrs. Bouslog a day or two after the second meeting, and she asked me if I recalled these things, and at that time I did.

Q. Can you tell the Committee whether your examination of the affidavit when you went over it was casual or whether it was in detail?

A. It was very detailed, and we compared it with her notes. I asked her a couple of questions about it, and her notes refreshed my memory as to exactly what had happened.

Q. This was a pretty serious business for you?

A. Very serious, certainly as far as I was concerned.

Q. Mr. Hall, before coming in this committee room you have never discussed this case with me, have you? A. No, I haven't.

(Testimony of Jack Hall.)

there will be a new crime? People will be charged with knowing what is included in books and ideas. She referred at the same time to the Los Angeles trial?

A. I think the first part of it, I see it was in this newspaper I just read, and I don't deny that that was said. The second part I don't recall.

Q. You don't deny that she said unless the Smith Act trial was stopped in its tracks there will be a new crime?

A. No, I don't deny that. I am not sure it was said.

Q. Did she make the statement that she urged the gathering to go out and tell others and explain what a vicious thing the Smith Act is, and people are tried for books written years ago, written by others?

A. Yes, I think something along those general lines, tell your neighbors about the thing.

Q. Were you paying close attention to what Mrs. Bouslog was saying?

A. Yes, fairly close, I think.

Q. Do you deny now that she used the term, "Shocking and horrible things that go on in the trial"? [292]

A. Yes, I do.

Q. How many people were present?

A. Oh, I guess the theater was practically full. I would say there were around 400. The newspaper story says 250.

Q. What would be the mental calibre of the people that were present, would you say?

(Testimony of Jack Hall.)

A. I think they are normally intelligent citizens.

Q. Would they be inclined to listen to a lawyer in lawyer-like talk, or do you feel that they would have to be explained legal phrases and legal language in more layman's talk?

A. They are all laymen. You find many lawyers that have difficulty understanding legal language.

Q. Assuming that you have associated with many lawyers on both sides of the fence and you, yourself, understand legal talk and lay talk, would you say that Mrs. Bouslog's speech was legal or lay talk?

A. Well, I think it was a lay explanation of the legal aspects of the case.

Q. So that she was I don't say speaking pidgin English, but she was talking like a lay person so that the lay person could understand, is that correct?

A. To some extent. There wouldn't be much point in [293] talking legal language to them.

Q. You do say that Mrs. Bouslog has made other speeches? A. Yes.

Q. For the same purpose?

A. To please the defense committee.

Q. All explaining the goings on at the Smith Act trial?

A. Not the goings on at the Smith Act trial, the nature of the Smith Act.

Q. Have you heard any of these speeches that Mrs. Bouslog made other than the Honokaa speech?

A. Yes.

(Testimony of Jack Hall.)

Questions by Mr. Peters:

Q. Let me ask you a question, Mr. Hall. This meeting at Honokaa was under the auspices of the defense committee? A. That is correct.

Q. And was the meeting for the purpose of securing further contributions?

A. No, it wasn't. The contribution program of the defense committee had been set up and approved long prior to that.

Q. This was in the nature then of a report back to those that contributed to your defense?

A. I think that is a correct description of it.

Q. And that report back was a discouraging one?

A. Indeed it was. People also reported at the meeting who were rank and filers that came to the trial and sat in a few days listening to the proceedings, and they [294] reported at that meeting, too.

Q. So when you speak of Mrs. Bouslog's making speeches elsewhere, they were speeches of the same character, a report back to the——

A. Her speeches weren't reporting back. Her speeches were primarily an explanation of the Act itself, and the nature of the charge, and so forth. My own talks and the talks of others were on what was going on at the trial and what we considered to be its effect on the union and its objective, and so forth.

(Testimony of Jack Hall.)

Questions by Mr. Barlow:

Q. Now, Mr. Hall, I will ask you do you read the Honolulu Record?

Mr. Anthony: I object to the question.

A. I have no objection to answering the question.

Mr. Anthony: I know, but I have an objection to state. It has no relevancy.

(Argument by counsel.)

Chairman Pratt: Will you proceed with the examination, Mr. Barlow?

Q. (By Mr. Barlow): Mr. Hall, were you present at an ILWU defense picnic held on Sunday, May 25th, at Puuiki Beach, Waialua, Oahu, in 1952?

A. I could have been. I have been to picnics out there.

Mr. Peters: Do you remember?

A. I remember being out there to picnics and large gatherings. Whether there was a defense picnic at that time—— [295]

Mr. Peters: The question is whether or not that is one of the meetings to which you referred.

A. The one I was referring to?

Q. (By Mr. Barlow): I show you a copy of the Honolulu Record, dated Thursday, June 12, 1952, and ask you if you will look at page three in the right-hand corner and see if you can identify that article?

A. This article has nothing to do with Puuiki. This article speaks about Lahaini, Maui.

(Testimony of Jack Hall.)

Mr. Peters: I haven't had time to read it yet, but I wanted to get from Mr. Hall his ideas about this thing, his assertion that Mrs. Bouslog didn't make the same statements that you made.

The Witness: That is correct. Most of her speech was devoted to explaining what the Smith Act was and what the charge was and the way the conspiracy trials permit the use of hearsay evidence and things of that [279] nature. My speech, on the contrary, was directed to the fact that from considering the trial an attack upon the union and I didn't see how there could be a conviction if the evidence produced up to that time was all the evidence that the government had, and hoped that there were a few people in the jury that would be courageous enough to stand up against pressure, not as Mr. Matsukawa says in his story.

Also I told them the real attack being on the union, as we saw it, that if the union remained united and firm and held together, whether I was convicted or not, was immaterial, that the prosecution would actually lose the case, because the object was the union, as we were able to develop in recording a couple of FBI agents, Mr. Brooks and Mr. Condon.

Questions by Mr. Peters:

Q. Then is it a fair statement that Mrs. Bouslog did not criticize the judge as to his manner of the conduct of this case?

(Testimony of Jack Hall.)

nation and if he says yes, have it marked for identification. If he says no, well, prove it otherwise when you get to your rebuttal.

Mr. Pratt: We will take a brief recess.

(Recess.)

Chairman Pratt: May we proceed?

Q. (By Mr. Barlow): Did you look at all these, Mr. Hall? A. Yes, I did.

Q. Have you, Mr. Hall, looked at the issue of the Honolulu Record of Thursday, May 29, 1952?

A. Yes, it was handed to me during the recess.

Q. Can you identify the article contained therein? A. Yes.

Q. Did Attorney Harriet Bouslog speak at that rally?

A. I'm not sure. It was a pretty noisy rally with millions of kids around. I'm sure she was introduced, if she didn't speak. [297]

Q. But she was present?

A. She was present.

Mr. Barlow: I would like to have that marked for identification.

Chairman Pratt: Number 3 for identification.

(The document referred to was marked Petitioner's Exhibit No. 3 for identification.)

Q. (By Mr. Barlow): Now, the one dated June 12, 1952, do you identify that?

A. I identify the fact that there was a meeting that day at Lahaina, Maui, yes.

(Testimony of Jack Hall.)

A. She did not criticize the judge. She criticized the law.

Q. She criticized whom? A. The law.

Q. And there was no criticism then as far as Mrs. Bouslog was concerned as to the prosecution generally of persons accused of violations of the Smith Act?

A. She criticized the law, and I guess you could assume [280] by that she criticized the use of the law on those persons.

Q. Was there a statement made by Mrs. Bouslog upon that occasion at Honokaa that the judge was making up the rules of evidence as he went along?

A. No, that is not so. She said that there were different rules of evidence that applied in the Smith Act case as compared to the normal criminal trial.

Q. She criticized those rulings?

A. Not the rulings, the rules, the established rules that permit the introduction of hearsay evidence. That is the thing she was referring to.

Q. Those rules were sustained by Judge Wiig, were they not?

A. Eventually during the course of the trial, that is correct.

Q. Those were the subjects of the assignment of errors in your appeal to the Ninth Circuit Court of Appeals, is that correct?

A. That is correct.

Q. And Mrs. Bouslog criticized those rules?

A. She criticized the rules as laid down, not in the trial but for the trial of conspiracy cases. In

(Testimony of Jack Hall.)

other words, the established rules of procedure. I don't know what you call them legally. She wasn't criticizing the judge's rulings in the case. I was the one that was doing that, and quite vigorously.

Mr. Anthony: Judge, it might be significant [281] here for the Committee to understand how long the trial had been going. This was a long trial, and it just started at this point.

Mr. Dodge: When did the trial start?

Mr. Symonds: November 5th. This trial lasted about six months, and Judge Wiig reserved ruling on a lot of vital motions until way late in the trial.

Mr. Peters: I thought as that trial went along there was a general criticism, not by defense counsel particularly, but there was a general criticism as to the rulings in that case.

Mr. Symonds: Letting it in subject to being stricken later. We tried to point out to Judge Wiig as long as the jury hears it what is the use of striking it later, but all pertinent rulings were made by Judge Wiig late in the case.

Mr. Peters: After the speech down at Honokaa?

Mr. Symonds: Yes, my recollection is much later.

Mr. Barlow: I think if Mr. Symonds is going to testify he should be sworn.

(Argument by counsel.)

Chairman Pratt: You may cross-examine, Mr. Barlow.

(Testimony of Jack Hall.)

Cross-Examination

By Mr. Barlow:

Q. Now, Mr. Hall, you say that you were present at the Honokaa speech? [282] A. Yes.

Q. Would you tell the Committee what Mrs. Bouslog did say, to the best of your recollection?

A. Well, in substance, as I recall her talk now —I have done nothing to refresh my memory on that outside of this newspaper article—the substance of her talk was that the Smith Act and the use of the conspiracy section of the Smith Act permitted the introduction of hearsay evidence and that it was very difficult to disprove that evidence because nobody was there at the time it was said. You had nobody you could cross-examine other than the person that was on the stand, and that sort of thing didn't normally happen in a criminal trial, and that the law was a bad law and things along those lines.

Q. How long did she talk, would you say?

A. I would say around 20 minutes or so. I thought it was much too long.

Q. What was the purpose of Mrs. Bouslog's speech on that occasion?

A. The purpose of her speech on that occasion was to explain to the public the nature of the law and the nature of the prosecution.

Q. What other purpose was there in your mind?

A. That is the only purpose we had in mind as far as asking her to appear at that meeting.

(Testimony of Jack Hall.)

Q. Was the purpose of Mrs. Bouslog's speech to crystalize [283] public opinion against Smith Act cases?

A. I wouldn't say so, as we expected most of the people at the meeting would be union people, and their attitude on Smith Act cases was pretty well crystalized long before we got there.

Q. You were trying to sort of hold the reins against Smith Act cases?

A. Of course. The purpose of the Smith Act case was clearly stated by Mr. Brooks and Mr. Condon. It was to divide the ranks and smash the union.

Q. And wasn't the purpose of Mrs. Bouslog in going out and making these speeches to crystalize public opinion against Smith Act trials and to try to convey to the public——

Mr. Anthony: I object to this witness stating what the purpose of the defendant is. He is not the person to ask that.

(Argument by counsel.)

Mr. Barlow: I will rephrase the question.

Q. Who set up the meeting?

A. By the defense committee. We had a union-wide defense committee, and this meeting, like many other meetings were called by the defense committee.

Q. You say you were one of the speakers?

A. Yes.

Q. And Mrs. Bouslog was one of the speakers?

A. At the Honokaa meeting, yes, sir.

(Testimony of Jack Hall.)

Q. Do you know why the defense committee asked Mrs. Bouslog to make a speech on that occasion? [284]

A. To explain the legal aspects of the prosecution.

Q. Didn't Mrs. Bouslog say on that occasion or stress in that speech the need for winning the battle of the Smith Act in a court of public opinion, or words to that effect?

A. I don't recall her saying that specifically.

Q. Were there other meetings of this kind where Mrs. Bouslog spoke? A. Yes.

Q. About the Smith Act?

A. Yes, about the case, yes.

Q. About the case. Are you referring to your case or the Fujimoto case?

A. I am referring to the Fujimoto, et al.

Q. So that besides this Honokaa speech she did go around and make several other speeches?

A. Where she was invited by the defense committee to speak she spoke. As I understand, the other lawyers spoke, too.

Questions by Mr. Peters:

Q. This defense committee, Mr. Hall, that you speak of, was that a committee established and sustained by the union? A. Completely.

Q. For the purposes of taking care of the defendants in the Smith Act?

A. For the purpose of taking care of this defendant and any other members of the union that

(Testimony of Jack Hall.)

might be involved in similar prosecutions. It had nothing to do with the other defendants. [285]

Q. It was just yourself, personally, then?

A. Up to that time the defense committee was undertaking and financing the defense of Simeon Bacalor, who at that time was involved in a deportation proceeding.

Q. That defense committee was holding these meetings, was it handling the financial end?

A. It was. The committee is still in existence and it still has money.

Q. That is, the attorneys haven't got it all?

A. They've done pretty well.

Questions by Mr. Barlow:

Q. Mr. Hall, do you recall Mrs. Bouslog saying something to the effect that men in power are trying to put men in jail because of their thoughts and books which were written before he was born, referring to Jack Hall?

A. There may have been something along those lines, attempts being made to put people in jail for reading books that were written long before they were born, and using books that probably they had never seen or read, and using that to put people in jail.

Q. Do you remember her saying something to the effect that the government never used conspiracy when they have a case, but when they do not have enough information and evidence they lump a number of people together and say they agreed to do something?

(Testimony of Jack Hall.)

A. I think I recall something along those general lines, not necessarily in those specific terms, that stated to [286] the effect that if they had any real evidence they would be prosecuted under the provisions of the law that prohibit various forms of subversive activity, actual actions as against the conspiracy statute, where they don't have such evidence.

Q. Did she refer to the so-called myth of the agents of the FBI? A. The what?

Q. The myth of the agents of the FBI.

A. I don't know what myth you are referring to. There are lots of myths about the FBI, in my opinion.

Q. Did she say anything about the FBI being called federal cops and the cops push people around?

A. The first part, as I recall, there is nothing secret about FBI agents. They are the same as any policemen. They are cops for the federal government like the policemen of Honolulu are cops for Honolulu. The last part I don't recall.

Q. Did she make a statement to the effect that there is a slogan, "Put away your thoughts, here come the federal cops"?

A. No; I don't remember that slogan.

Questions by Mr. Peters:

Q. That title of director, Mr. Hall, that means the top officer of the union, is that correct?

A. I'm afraid I don't understand—director—my function is a local representative of the four

(Testimony of Jack Hall.)

international [287] officers, Mr. Bridges, Mr. Goldblatt, Mr. Robertson and Mr. Brogan currently. I am responsible to them. I am not an elected official. My only role here is in giving advice and assistance to the single local union that we now have, and whatever influence I exert, it is only on a personal basis, and I am unable to compel anything.

Q. That is, you hold no office?

A. I hold no office.

Questions by Mr. Barlow:

Q. Did she talk about the testimony of Paul Crouch?

A. Yes, I think there was some reference to Mr. Crouch's testimony. He was galloping across the Steppes, something along that line, in a Red Army uniform. All that was supposed to be evidence against Jack Hall.

Q. Did she urge the audience to try to remember what they did or said 12 years ago?

A. I don't recall whether it was 12 years ago, but I recall her saying something along the lines, "Can you remember what you did 12 years ago," yes, something to that effect.

Q. Did she say anything to the effect that "God knows no one has a memory that good. Yet they use that kind of testimony. Why? Because they will do anything and everything necessary to convict"? A. I don't recall that specifically.

Q. You don't remember her saying anything at all like that? [288]

A. Would you read that again?

(Testimony of Jack Hall.)

Q. She urged the audience to try to remember what they did 12 years ago. She said, "God knows, no one has a memory that good. Yet they use this kind of testimony. Why?"

A. Up to the "Yet," I think I remember.

Q. "Yet they use this kind of testimony. Why? Because they will do anything and everything necessary to convict." A. I don't recall that.

Mr. Peters: Do you deny, Mr. Hall, that she made that statement? Do you deny that she made that statement?

The Witness: No, I can't deny other than the last part. I certainly do not recall, and I do not think she made the part of the statement where she is supposed to have said that they will do anything and everything to convict.

Q. (By Mr. Barlow): She never said anything like that?

A. Not that I recall, I am quite positive.

Q. Did she speak of the conflicting testimony of the same witness in the Smith Act Trial and in previous hearings? A. Yes, I think so.

Q. Did she say that the government knew that this was so but the witness was getting the green light anyway to go ahead and say it in order to convict? A. I don't recall that.

Q. Do you deny that she said it? [289]

A. No, I can't deny it.

Q. Did she mention Izuka's testimony in the Reinecke trial?

A. At Honokaa, I am not sure. I know she has

(Testimony of Jack Hall.)

mentioned it in other speeches. I think she mentioned it on Kauai.

Q. Did she talk about Henry Johnson's testimony?

A. Yes, because Henry Johnson originally came from Honokaa.

Q. Did she say anything to the effect, and I am quoting, "On cross-examination Johnson said he did not tell the names of the books but just showed Jack Hall the duffel bag. So Jack Hall violated the Smith Act because he saw a duffel bag with some books on overthrowing the government in it. It's silly. Why does the government use your money and mine to put people in jail for thoughts?" Did she say anything like that?

A. Something like that. I don't remember putting Jack Hall in jail for thoughts, but there was something about duffel bag evidence.

Q. Did she say anything to the effect that the government has been putting on a barrage of propaganda for many years and expects the people in the jury to have hysteria and just hearing about communism is enough to put some people in jail? Did she say anything along those lines?

A. I don't think she accused the government of putting out propoganda; as I recall there was some mention of the fact that an accusation of communism was sufficient to put people in jail. [290]

Q. Did she say anything about the people in the jury having hysteria in a situation like that?

A. No.

Q. You deny that she said it?

(Testimony of Jack Hall.)

A. I deny that she said it as far as I can recall.

Q. Did Mrs. Bouslog say that there is no such thing as a fair trial in the Smith Act case?

A. I think she said something along the lines that it is impossible to get a fair trial in a Smith Act case because of the inability to cross-examine witnesses on hearsay evidence, something along those lines. I know I said it.

Q. Did she make any statement to the effect that in this particular type of case the rules of evidence have to be scrapped; otherwise, the government can't make out a case?

A. I think she said the normal rules of evidence that apply in other criminal cases have to be scrapped and rules that permit hearsay evidence are used, but whether the actual word she used was "scrapped," I don't know, Mr. Barlow.

Q. Did she refer to the Majors-Palakiko case?

A. I don't recall on that particular occasion.

Q. Did she make a statement to the effect that the government can't make a case if they tell just what they did, so they widen the rules and tell what other people did years ago, including everything, including the kitchen sink? [291]

A. I don't recall it exactly in those terms, but she did say something about the fact that they put in what other people did, and whether it was the kitchen sink or not, I don't recall, but it could have been and should have been.

Q. Did she make a statement to the effect that unless the Smith Act trial stopped in its tracks here

(Testimony of Jack Hall.)

A. Well, I would certainly talk to him on that first day, because I didn't know anything about his condition. I thought if at any time he would have tired we probably wouldn't have proceeded any further than that point. We did stop after about an hour and came back. I think normally it would be preferable to talk to a man when he wasn't so sick, but I don't think there was anything wrong with his mind. He seemed rational in his answers.

Q. (By Mr. Dodge): Did he make any statements that were incoherent, that didn't make sense?

A. Well, he was doing some mumbling about God forgiving him, and so forth. It probably made sense to him, but it wasn't in response to any questions.

Q. (By Mr. Pratt): Were most of his answers just yes or no?

A. No, it wasn't that bad. He didn't talk at great length. I don't suppose he is that type of man at any time, but he answered questions by giving complete answers. [308]

Q. (By Mr. Peters): You considered him rational the first day?

A. I considered him rational, but a very sick man.

Q. The second day you saw him?

A. He wasn't talking, so we decided we had better let him rest.

Q. You would say there had been a very rapid deterioration?

(Testimony of Jack Hall.)

A. I couldn't judge the reason why he wasn't talking the second day. He was sitting.

Q. You didn't ask him any questions the second day?

A. No, we just said, "Hello, how are you, and I hope you get well pretty soon."

Q. All reassurance?

A. I would say that is correct.

Q. (By Mr. Dodge): Did you go back after that second day?

A. No; I have never seen him to this day.

Q. (By Chairman Pratt): Did you review the notes that you had taken the previous day with him?

A. No, we didn't. I didn't take the notes; Mrs. Bouslog did.

Q. But you didn't review any of this with him?

A. No, we didn't.

Chairman Pratt: Any further questions?

Mr. Barlow: No further questions.

Mr. Anthony: I have a question, Mr. Chairman.

Redirect Examination

By Mr. Anthony:

Q. After the Honokaa speech did you let Mrs. Bouslog [309] talk any more?

A. Let's put it this way: Mrs. Bouslog did not talk at any further rallies.

Mr. Anthony: Very well; that's all.

(Witness excused.)

(Testimony of Jack Hall.)

Q. I am asking you if you can identify this article?

A. I can't identify the article. It is the first time I have seen it.

Q. Will you read it and see if it will refresh your recollection as to any meeting you may have attended?

A. I can recall the meeting referred to, yes.

Q. Was Mrs. Bouslog present at the meeting?

A. Yes, she was, as I recall.

Q. Did Mrs. Bouslog make a speech?

A. Yes, she was one of the speakers.

Q. Did you make a speech? A. Yes.

Q. And was this the same type of defense fund speech campaign that was in progress during the Smith Act trial? A. A defense fund speech.

Q. Who called this meeting?

A. This meeting, as I recall it, was called by the units at West Maui.

Q. What was the purpose of Mrs. Bouslog's presence, if [296] you know?

A. I think she was invited to explain the application of the——

Mr. Anthony: Mr. Chairman, I am going to object to this. We are getting so far afield here; we are back to May 25, 1952. It is entirely irrelevant to anything that is before the committee.

(Argument by counsel.)

Mr. Peters: Why not ask the witness if that is one of the meetings he referred to on cross-exami-

(Testimony of Jack Hall.)

Q. Do you remember Mrs. Bouslog's presence?

A. She was present.

Q. Did she make a speech?

A. Yes, I recall her saying something.

Mr. Barlow: I ask that it be marked for identification.

Chairman Pratt: Number 4 for identification.

(The document referred to was marked Petitioner's Exhibit No. 4 for identification.)

Q. (By Mr. Barlow): June 19, 1952, page five, do you remember Mrs. Bouslog's being present and making a speech at that rally?

A. This refers to the rally at Central Intermediate School, yes.

Mr. Barlow: I offer that for identification.

Chairman Pratt: Number 5 for [298] identification.

(The document referred to was marked Petitioner's Exhibit No. 5 for identification.)

Q. (By Mr. Barlow): September 4, 1952, page 1.

A. I don't recall whether she was present at that meeting or not. The paper is probably correct, but I can't testify.

Q. Did Mrs. Bouslog tell you, Mr. Hall, why she wanted you to come to see Mr. Fuller?

A. She said that Mr. Fuller had asked to see me and he had been pretty upset since the verdict and was shouting and begging for forgiveness, and

(Testimony of Jack Hall.)

so forth, and it had been called to her attention, I believe, by his sister.

Q. Did she indicate to you that David Fuller had asked for you? A. That is correct.

Q. She didn't indicate that she had suggested that you go?

A. No, other than that she had talked with him previously and he would like to see me and wanted to talk to me.

Q. Now, while you were present, do you remember what conversation took place between Mr. Fuller and Mrs. Bouslog?

A. I was sitting right next to him. I'm not sure I can recall everything that was said at that period of time.

Q. Tell the Committee what transpired while you were present.

A. Well, we were both sitting very close to Mr. Fuller and carrying on a conversation, a very odd conversation [299] at times. We would ask him a question, or I would ask one or Mrs. Bouslog would ask one, and he would think a long time and very faintly give us replies, practically in a whisper. I don't know whether there was something wrong with his throat as a result of the shouting he was supposed to have done or not.

Q. Would you tell the Committee, as far as you know, what type of questions were directed at Mr. Fuller by you?

A. I don't remember all that I asked. I did ask a number of questions on rumors that I had heard.

(Testimony of Jack Hall.)

One that I recall asking was I heard from one of the reporters that there had been a big argument in the jury room that the reporters had heard outside, and I asked him what that was about and what the argument was about and who was shouting at who, and he replied that there was an argument between those that were in favor of a guilty verdict and those that were not or had not yet made up their minds, and it was pretty sharp.

Q. Who did most of the questioning, you or Mrs. Bouslog?

A. I couldn't say. I suppose it was about half-half. We were developing a particular subject, and she would ask a question and I might ask another one along the same general lines, and he volunteered a few things from time to time. I told him we wanted him to tell us everything that he could remember as to what had transpired.

Q. Why did you feel that you wanted him to tell you everything? [300].

A. Why? Because I was convinced and firmly convinced that the jury wasn't considering the evidence in the case nor following the instructions of the judge; otherwise, they would have been out a much longer period of time. I felt that there were persons within that jury that were anxious to get it over with and didn't care about the evidence, and I wanted to see if I could be supported.

Q. Had you talked with any of the jurors with Mrs. Bouslog before you had gone down to Fuller's house?

(Testimony of Jack Hall.)

A. Not that I recall. I think that one of the other jurors was talked to by Kealalio, but I don't know whether that was before or after Mr. Fuller. I think it was after.

Q. Was that Juror Peroff?

A. I think that is correct.

Mr. Anthony: I object to this hearsay, if the Committee pleases.

Chairman Pratt: Sustained.

Q. (By Mr. Barlow): Now, did Mr. Fuller tell you why he felt that he had to vote guilty?

A. Yes, he was afraid not to, apparently both for himself and because of his brothers' employment at that time. If he didn't go along with the majority he seemed to feel that he wouldn't be liked by his employers and his brothers might have trouble. That is one of the things that he also appeared to have some feeling that perhaps [301] because of it, because of the verdict and his voting that some of the fellows on the waterfront might not like it, so we were going to great pains to assure him that was not so, and he could go back to work and there were no problems, and Mr. Peroff was already back on the job.

Q. Would you say that you interrogated him more than he volunteered?

A. No; I don't know whether you call it interrogating or not. He talked more in response to questions than volunteering information. We were trying to refresh his memory.

Q. Would you say that you were asking him

(Testimony of Jack Hall)

questions and he was answering you as best he could, or would you say that he was volunteering all this information to you?

A. I wouldn't say he was volunteering all of it. He was willingly answering questions and telling us what he could remember.

Q. So you would say that most of the answers or most of the information he gave was in response to questions put by either you or Mrs. Bouslog, is that right?

A. I guess that is a fair statement, because he was trying to remember things, and when he would sit silent for awhile we would ask him about a particular matter. He volunteered things, like one of the guys, one of the members of the jury playing solitaire during the discussion.

Q. Could you tell the Committee what he volunteered, what information he volunteered to [302] you?

A. I'm afraid my recollection isn't that good as to what came in one fashion and what came in another.

Q. Would you tell the Committee what information you and Mrs. Bouslog elicited from Mr. Fuller?

A. I'm not sure I can remember all of that. I know a couple of specific things that I did elicit information on. One was on this noise in the jury room. Another was the information referred to there that one of the jurors was talking about getting away from Hawaii and getting away on a mainland trip. Incidentaly, that was Mr. Abreu,

(Testimony of Jack Hall.)

and the reason I asked that question, it was common knowledge around the courtroom that he was anxious to get back to the mainland, and, as a matter of fact, he spoke to me in a short conversation when we met in the front of the elevator that the trial was winding up, and I think I said something like, "Well, finally we are at the end of the row," and he said, "Yes, I hope I can get out of here in time to make my trip," something like that, along those lines. He said he thought he would make it. Those are the only two things that stand out in my mind at the moment.

Q. Was there any particular reason that you know of why Fuller and Peroff were the two jurors contacted by defense counsel?

A. I think obviously the only reason Mr. Fuller was contacted, that the contact was made by his sister originally. In the case of Peroff, he was the only other juror that any of us knew. I think Mr. Kealalio knew [303] him and talked to him.

Q. Mr. Kealalio? A. Kealalio.

Q. Is that Joe Blair?

A. Yes, that is also known as; it isn't an alias.

Q. Then you went to see Mr. Fuller the second day on a Sunday, is that right?

A. That's right.

Q. And you took this fellow, Joe Blair, with you? A. Yes.

Q. Was there any particular reason for taking Joe Blair with you?

A. Yes, I think I stated earlier to try to reas-

(Testimony of Jack Hall.)

sure him that when he got well and got back to work he wouldn't find any difficulty on the waterfront with the longshoremen. As a matter of fact, Mr. Peroff was on very good terms with everybody since then.

Q. Now, Mr. Hall, I show you a pamphlet entitled "Fear" and it states it was published by the International Longshoremen's and Warehousemen's Union, Honolulu, Hawaii. Do you recognize that pamphlet?

A. Yes, I have seen the pamphlet and read it.

Q. Did the ILWU put it out?

A. Yes, it says so right on the face of it.

Q. Do you know what the pamphlet contains?

A. I have read it. It is apparently a speech that was made on Kauai. I wasn't present when the speech was made.

Q. You weren't present when the speech was made? [304] A. No.

Q. You read it. Could you tell the Committee what it is about?

Mr. Anthony: I object to him telling something about what is in a document that is not even presented here.

Chairman Pratt: Sustained.

Questions by Mr. Dodge:

Q. Mr. Hall, you stated a moment ago that Joe had gone up to assure Fuller that he would have no difficulty in returning to work.

A. That's why we brought him along.

(Testimony of Jack Hall.)

Q. Had he expressed some fear about that the day before?

A. We were afraid that was one of the things that was bothering him, along with this feeling of guilt. Perhaps the two were tied together, and we wanted him to recover as rapidly as possible.

Q. Mr. Fuller indicated to you the day before that he was afraid, was that your supposition?

A. He didn't say that he was afraid, but we gathered, I personally gathered, that might be one of the things bothering him, and that's why I tried to reassure him that there were no hard feelings, that he had done what he felt he had to do under the circumstances.

Q. There has been earlier testimony in this proceeding given by a psychiatrist, by one witness, that there was some fear expressed by Mr. Fuller, and I was merely asking if that fear had been expressed to you while you were there on Saturday. [305]

A. Not in any spoken word.

Q. But you did sense it?

A. I sensed that that might be one of the things. If I was in his position I might feel the same way.

Questions by Mr. Barlow:

Q. Mr. Hall, you indicated in your earlier testimony that Mr. Fuller looked pretty sick and emotionally disturbed. Could you tell the Committee what you mean by that statement?

A. Well, he was very tense and constantly staring at this picture on the wall, and he seemed very weak. He didn't look good, no question about that.

(Testimony of Jack Hall.)

Q. Did he appear to be rational to you in all his statements?

A. He appeared to be rational in terms he answered questions based on what we had asked him. We asked him questions, I'm sure, that don't appear in the affidavit. One that I recall asking was whether he read the newspapers, and I noticed when I looked over the affidavit prior to coming in here to testify there was no mention of it. I guess they didn't mention it because it wasn't anything that appeared to be wrong.

Q. You stated he looked pretty sick, emotionally upset, he looked pretty bad. Do you feel that it was a proper time for you to talk to him about the Smith Act trial?

A. I felt we wanted to talk to him and see if we could get any information and do any good. We asked him, as I recall it, during the discussion if he was tired and [306] wanted us to come back later, and he kept asking us to stay. We stayed about an hour, and we finally felt we had better get out and come back and see him the following day, and the following day, as I testified, he didn't say anything; he was a little worse. We thought we better let him rest up.

Q. Did he seem rational the second day you went back?

A. He didn't say anything. I wouldn't say he was as rational as he was the day before, but he obviously didn't want me to leave. He got hold of

(Testimony of Jack Hall.)

my leg and hung on. I had to break hi grip. He is a very strong man.

Q. You say you recognized the fact that he was emotionally disturbed?

A. I'm not a psychiatrist, but as a layman, he looked emotionally disturbed to me.

Q. And he looked sick to you?

A. He certainly didn't look like a healthy individual.

Q. And that the reason you did talk to him about the Smith Act trial was a question of expediency?

A. Yes, as I understand it, we had to get the information soon to be any good, but it didn't do any good, at least not so far.

Q. Do you feel that if it wasn't necessary to rush so that you would have talked to him under ordinary circumstances?

Mr. Anthony: I object to that as [307] hypothetical. That is a matter of judgment for the lawyer interrogating the witness in any event.

(Argument by counsel.)

Chairman Pratt: It seems to me, Mr. Anthony, he has indicated why he was doing it, and this is just the follow-up in the same question. It has to do with the condition the man was in. It has to do with the weight of what he says.

Mr. Barlow: Read the question, please.

(The question was read by the reporter.)

Mr. Barlow: I would like to offer this for identification at this time.

Chairman Pratt: Any objection?

Mr. Anthony: There can be no objection, Mr. Chairman.

Chairman Pratt: Very well, Number 6 for identification.

(The document referred to was marked Petitioner's Exhibit No. 6 for identification.)

(Discussion regarding further hearing in this matter. Adjournment.)

Reporter's Certificate

I certify that the foregoing is a full, true and correct transcript of proceedings in the above-entitled matter on December 3, 1954.

Honolulu, Hawaii, January 22, 1956.

/s/ L. T. CHAFFEE,
Official Reporter. [310]

December 6th, 1954—9:00 A.M.

Mr. Pratt: Are Counsel ready?

Mr. Anthony: Ready. Mrs. Bouslog, will you take the witness stand, please?

HARRIET BOUSLOG SAWYER

having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Anthony:

Mr. Pratt: Please state your name.

The Witness: Harriet Bouslog Sawyer.

Mr. Anthony: You go by the name of Harriet Bouslog?

The Witness: For professional reasons.

Q. How old are you, Mrs. Bouslog?

A. I am 42 years old.

Q. Where were you born?

A. Maxville, Florida. That was an accident, though. I am really a Hoosier—Bloomington, Indiana.

Q. Indiana is your home state? A. Yes.

Q. Where did you get your legal training?

A. Indiana Law School State University.

Q. Did you get your LLB there? A. I did.

Q. What year? A. 1936. [311]

Q. Where did you do your graduate work?

A. Indiana University, Bloomington, Indiana. That is the State University in Indiana.

Q. As I understand the laws of Indiana, anybody over twenty-one can be admitted to the Bar. Is that an accurate statement?

A. That was true until the year before I graduated from law school, and then Indiana changed in 1935 from one of the easiest to one of the toughest states.

(Testimony of Harriet Bouslog Sawyer.)

Q. Were you admitted to the Indiana Bar?

A. I was—in 1936—by examination—after thorough written examination and filing my certificate of attendance at law school.

Q. Did you practice law in Indiana?

A. No, I did not. I got married the day I graduated from law school, and I went to the state of Massachusetts with my husband.

Q. Were you admitted to the Massachusetts Bar?

A. I was in the year 1937. I believe it was 1937, although possibly it was early 1938.

Q. And when did you come to Hawaii?

A. I came to Hawaii in September, 1939.

Q. Your husband came at the same time?

A. Yes, that's right. We came because he was employed as an instructor in English with the University of Hawaii.

Q. And did you apply for admission to the Bar in Hawaii?

A. I did. I believe in the summer of—I believe it was 1941. I didn't work when I first came out here. [312]

Q. You did not work? A. I did not, no.

Q. In 1941 you were admitted to the Bar, were you?

A. I was. Judge Peters, I believe, supervised the examinations the year I took them in 1941.

Q. And you have been practicing before the Bar of Hawaii ever since 1941, is that right?

A. Well, I have been admitted to the Bar. I

(Testimony of Harriet Bouslog Sawyer.)

was in—I left Hawaii in August, 1942, and in August, 1942, I went—after a brief visit to my home in Indiana, I went to Washington D. C., and I remained in Washington, D. C., until October of 1946—when I returned to the Territory of Hawaii. And in the latter part of 1946, I opened up my own law office here and have been practicing continually since 1946.

Q. In 1941, before you left the Hawaiian Islands, after you were admitted, did you practice law here? A. Yes, I did.

Q. In what firm?

A. I believe it was then called Stanley, Vitousek & Pratt—at that time it was Stanley, Vitousek, Pratt & Winn.

Q. How long were you with them?

A. Actually I went into that firm first in a stenographic and clerical capacity—I think very early in 1940. Sometime in 1940. And then Mr. Vitousek—he was never one to waste talent; so he had me doing legal research very shortly, and after I passed the Bar, he asked me to remain as a lawyer. [313]

Q. You were a clerk there?

A. I was a clerk, a law clerk, and a stenographer. And then when I passed the Bar, Mr. Vitousek asked me to remain as a lawyer, which I did, until between—that was between December, 1941, until I left in August, 1942.

Q. 1946 you opened your own office?

A. Yes.

Q. And when did you become associated with

(Testimony of Harriet Bouslog Sawyer.)

Mr. Symonds, your present partner, to the best of your recollection?

A. We formed a law partnership as soon as he had been admitted to the Bar in the Territory of Hawaii—which, I believe, was 1947.

Q. Mrs. Bouslog, you are quite familiar with the charges that are pending against you in this proceeding, are you not?

A. I am. I have read the charges.

Q. One of the charges being that you made a speech at Honokaa. Do you recall that incident?

A. I did make a speech at Honokaa. And I made it on the particular day in the Bar charges.

Q. Shortly after that speech was made, that matter was the subject of colloquy between counsel in United States vs. Fujimoto, et al., and the Court. Is that correct? A. That is correct.

Q. Handing you Exhibit "D," which is the stenographic report of the Transcript of Proceedings on December 16, 1952, and ask you if you can identify that? [314]

A. Yes, I can identify this from having examined it several times before as an excerpt from the transcript in United States vs. Fujimoto, which contains a colloquy between myself and Judge Wiig in relation to the Honokaa speech which took place on December 16th, 1952, and my recollection is that —I can't offhand remember whether that is the Tuesday following the speech on Sunday or the Monday following the speech on Sunday.

(Testimony of Harriet Bouslog Sawyer.)

Q. In any event, it is shortly after the speech on Sunday?

A. It is no more than two days after the speech.

Q. Mrs. Bouslog, you made a statement to the Court as to your best recollection as to what you said in that speech at that time, did you not?

A. I did. I informed the Court of my best recollection of the speech, and answered questions of the Court.

Q. And your best recollection is contained in that colloquy, Exhibit "D" in this case?

A. Positively. That is my best recollection. It was made right—very shortly afterwards.

Q. And you affirm the truth of the statements you made to the Court in that proceeding?

A. I do, indeed.

Q. Mrs. Bouslog, you, of course, are familiar with the motion for a new trial and affidavits in support thereof, dated July 1st, 1953, which contains your own affidavit and the affidavits of Mr. Hall and Mrs. Cabreros? Exhibit "B" in this proceeding? [315]

A. Yes, I am familiar with the motion for new trial and the three affidavits, including my own.

Q. You prepared the—I withdraw that. Matters and things set forth in your affidavit—I will withdraw that. You drew those affidavits yourself, did you not? A. I did.

Q. And you drew those affidavits on the basis of information that you had obtained as a result of a visit to the Fuller residence?

(Testimony of Harriet Bouslog Sawyer.)

Mr. Barlow: Just a minute. May it please the Chairman, I don't want to continually interrupt, but the questions are very, very leading.

Mr. Anthony: So what? Everybody knows that is what she did.

Mr. Barlow: May I address my remarks to the Court without being interrupted by counsel and ask the Chairman to make a ruling?

Mr. Anthony: Just a preliminary question. Let's get on with the case.

The Chairman: Well, in view of the objection and considering the witness, we don't need to lead her.

Mr. Anthony: What is the ruling?

The Chairman: Objection sustained.

Mr. Anthony: You read the affidavit before coming to the hearing?

The Witness: Yes, I have.

Q. On more than one occasion? [316]

A. On more than one occasion.

Q. Are the matters and things set forth in your affidavit true to the best of your knowledge and information and belief? A. They are.

Q. Do those matters represent your best recollection as to the events on that occasion?

A. They do.

Q. And you were requested to visit Mr. Fuller, were you not? A. I was.

Q. Now, Mrs. Bouslog, have you ever been charged before any Bar Association for unprofessional conduct?

(Testimony of Harriet Bouslog Sawyer.)

A. Not in the twenty—almost twenty-four years I have been admitted to the various Bars.

Q. Have you ever been——

A. I guess that was a little long. I am figuring wrong. That was '36 to date—I have never been charged or accused.

Q. Have you ever been sentenced for contempt in any proceeding in which you have participated?

A. I have not.

Mr. Anthony: No further questions.

Cross-Examination

By Mr. Barlow:

Mr. Barlow: Mrs. Bouslog, are you a member of the Hawaii Bar Association?

The Witness: I am. [317]

Q. Are you a member of the American Bar?

A. No, I am not.

Q. Are you a member of the National Lawyers' Guild?

Mr. Anthony: That's immaterial. I object to that.

The Chairman: She may answer the question.

The Witness: I am a member of the National Lawyers' Guild.

Mr. Barlow: Now, Mrs. Bouslog, you say that to the best of your recollection, the colloquy you had with Judge Wiig represents your version of what transpired at Honokaa?

The Witness: That is a fair statement, yes.

(Testimony of Harriet Bouslog Sawyer.)

Q. And you and Judge Wiig did discuss the speech that you made? A. Yes.

Q. And Judge Wiig took a dim view of the speech?

A. Judge Wiig was not there at the speech.

Q. On the day that you had the colloquy with Judge Wiig, why did Judge Wiig ask you questions about the speech?

Mr. Anthony: I object to that as immaterial. There is no question why he asked her. He had a right to ask her.

The Chairman: I think it is a proper question on cross-examination.

The Witness: I believe it was at your suggestion and the suggestion of Mr. Walsh, the Prosecution, that Judge Wiig asked me about the speech, Mr. Barlow. [318]

Mr. Barlow: And after you had gotten through with your explanation in your colloquy with Judge Wiig, the Court at Page 2904, made a comment, is that right?

This, I think—this is the copy of Exhibit "D" that we furnished and that I have already testified does reflect the colloquy between me and Judge Wiig.

Q. And Judge Wiig said, and I quote: "The Court: 'Well, Mrs. Bouslog, I am not satisfied with your explanation to the Court. I think this matter requires further investigation.'" Do you remember Judge Wiig making a statement to that effect?

A. I do.

(Testimony of Harriet Bouslog Sawyer.)

Mr. Symonds: Why don't you read the rest of the paragraph?

Mr. Barlow: May I ask the Chairman not to be interrupted unless it is a proper, valid objection?

The Chairman: I think Mr. Barlow's request is proper, Mr. Symonds. You can always bring up the rest of it when it is your turn.

Mr. Anthony: The question, I might add, is highly significant.

The Chairman: You can draw it to the attention of the Committee.

Mr. Barlow: May I ask the Chairman for the exhibit on Mr. Yoshida's transcript—notes and things. Oh, Matsuoka, I am sorry. [319]

Mr. Barlow: Mrs. Bouslog, Mr. Matsuoka testified that you stated at the trial, or at the hearing, or at the meeting over at Honokaa that you wanted to tell about some rather shocking and horrible things that go on at the trial. Did you make any such statement in or out of context?

The Witness: Two days afterwards I stated to Judge Wiig that I had no recollection of ever making any statement of any kind of that character or having said those words.

Q. I am asking you—did you make those statements?

A. I have no recollection of making those statements on that occasion, or any other occasion.

Q. You were present when several of the people testified who were members of the audience at the time you made your talk at Honokaa?

(Testimony of Harriet Bouslog Sawyer.)

A. Yes, I was present.

Q. Do you remember several of the people, including one ILWU member stating that you did say that you were going to tell about the rather horrible and shocking things that go on at the trial?

A. No, I only remember this particular newspaper reporter testifying that I used those words.

Q. You don't remember the young lady——

A. I don't remember it, no.

Q. ——in the white suit——

A. It is possible they did, but right at the moment I don't remember anyone except the newspaper reporter, Mr. Barlow. [320]

Q. You were present and you heard the young lady in the white suit testify, is that right?

A. Oh, yes, I remember her very well.

Q. And you don't remember her saying——

Mr. Peters: Where was this testimony given?

Mr. Barlow: Right here in this room. I think her name was Mrs. Cabral, I'm not sure. The young lady in the white suit. Mrs. Andrade.

The Witness: I don't remember, Mr. Barlow. I don't remember her saying those exact words. I know you asked a lot of witnesses—whether you used the words a lot of times—but I don't remember the witnesses, in giving their recollection, saying that I said that, except Mr. Matsuoka. I just have no visual mind as to the remembrance of that particular testimony.

Q. Is it your testimony that if she did testify to that effect that she was in error?

(Testimony of Harriet Bouslog Sawyer.)

A. She was mistaken.

Q. That you did not make those statements?

A. Well, you heard Mr. Hall say——

Q. No, I am asking you.

A. She may have been confused. She may have been confused as between what I said and what Mr. Hall said, because, after all, we spoke at the same meeting.

Mr. Peters: Now, do I understand that upon the occasion of this colloquy before Judge Wiig, December 16th, 1952, you testified then or made the statement to the Court. [321] Were you placed under oath?

The Witness: No, I was speaking as an officer of the Court—speaking to the Court.

Mr. Peters: Did you tell the Court at that time of using that language?

The Witness: I did.

Mr. Peters: Why is it within two or three days of the speech at Honokaa you couldn't equivocally either admit or deny having made that statement? It was merely a matter of recollection.

The Witness: I thought that was an unequivocal statement. I explained to the Court that I had no notes of the speech; that it had been an extemporaneous speech. And that—I considered that I have no recollection of having made that statement—an unequivocal statement that I hadn't made that statement.

Mr. Peters: I don't consider that an equivocal

(Testimony of Harriet Bouslog Sawyer.)

denial—of having said something that you have no recollection of.

The Witness: Well, Judge Peters, possibly it was an excess of lawyer's caution to say I have no recollection of having made the statement, because after all, I assumed that it was a matter of—that could be checked. There were about three or four hundred people at the meeting. I had no recollection and I know that a lot of other people who heard the speech had no recollection, but I didn't know what the situation was. And I assumed it was a matter that could be determined [322] one way or the other. So I told the Court that I had no recollection of having made the statement—that that was the statement I made at the time. And possibly it was equivocal because of an excess of lawyer's caution, not because I thought I had made the statement, Judge Peters. It doesn't sound like a statement that I would ever make. That is the thing that makes me so positive that the statement was never made, as well as not having had any recollection two days afterwards of having made it.

Mr. Barlow: Mrs. Bouslog, you made a statement in answer to Judge Peters'—something to the effect that it was equivocal because of lawyer's caution.

The Witness: I was using Judge Peters' words, Mr. Barlow. Judge Peters said that he didn't consider it—so I was merely using those words in quotes. I didn't intend them to be equivocal words when I used them to Judge Wiig.

(Testimony of Harriet Bouslog Sawyer.)

Q. Is it your testimony to this committee that you were equivocal or non-equivocal or unequivocal because of lawyer's caution?

A. My testimony to this committee is that, as I told Judge Wiig two days afterwards, I have no recollection of having used those words and I do not think I used those words.

Q. Are you familiar with the Canons of Professional Ethics of the American Bar Association?

A. Well, I took a course in ethics in law school, and I have read numerous law journal articles and other things from time to time, but honestly I don't believe I have [323] ever sat down and read a pamphlet entitled "The Canons of Professional Ethics" by the American Bar Association.

Q. Are you familiar or have you ever read of one of the canons which requires candor and fairness on the part of attorneys with the Court?

A. Oh, yes. I am quite familiar with that.

Q. Do you feel that the answer you gave Judge Wiig on the date you testified you had this colloquy was consistent with the Canons of Ethics?

A. Yes, I do.

Q. Then how do you equate that with the statement you made that you were equivocal because of lawyer's caution?

Mr. Anthony: I object to that. It is already asked and answered. The witness stated that she used the language of Judge Peters. It is not her language.

(Testimony of Harriet Bouslog Sawyer.)

Mr. Barlow: I respectfully submit——

The Chairman: It seems to me that was the question before, Mr. Barlow, and she answered it.

Mr. Barlow: I won't press it if it has been answered.

Examination by Mr. Peters:

Mr. Peters: Was there anything, Mrs. Bouslog, that you did after the hearing of the 16th of December to try and satisfy Judge Wiig with your statement?

The Witness: Judge Wiig directed Mr. Barlow's office to make an investigation at the close of that hearing—as the transcript shows. [324]

Mr. Peters: That isn't what I am asking you. Judge Wiig stated upon the conclusion of your statement that he was not satisfied. Did you do anything further to satisfy him?

The Witness: Well, I did not do anything further, except I know that the people—that there were—I have no personal knowledge; so I better not go into it.

Mr. Peters: You didn't——

The Witness: I did nothing further except make the full explanation of my comments to Judge Wiig.

Mr. Anthony: May I make a statement, Judge Peters? In that portion of Judge Wiig's colloquy, the entire paragraph which was not read to the Committee reads: "Well, Mrs. Bouslog, I am not satisfied with your explanation to the Court. I think

(Testimony of Harriet Bouslog Sawyer.)

this matter requires further investigation. And I am going to instruct the U. S. Attorney to make a further investigation of this matter. And if he finds under the provisions of Rule 42-B a notice and order to show cause should issue, then he will do so." I take it that point is not incumbent——

Mr. Peters: Rule 42-B—Rule 42-B is constructive contempt.

Mr. Anthony: That's right.

Mr. Peters: That is a constructive contempt of the United States District Court. But it seems to me the same question that was presented to this Committee was presented to Judge Wiig, if not directly, at least indirectly. [325]

Mr. Anthony: That is correct.

Mr. Peters: The question that arose in my mind —what effort, if any, by affidavits or otherwise, Mrs. Bouslog sought to satisfy the Judge.

Mr. Anthony: The Respondent made no effort. She was relying upon the results of the investigation. Isn't that correct?

The Witness: Yes. I might state to the Court that one of my co-counsel was informed thereafter by Judge Wiig that they had not—the investigation had not revealed grounds for ruling under Rule 42-B, your Honor.

Mr. Peters: Well, that only disposes of Rule 42-B. You still hadn't satisfied Judge Wiig as to your frankness and candor, didn't you?

The Witness: I did my best and I had told him the full truth as far as my speech was concerned

(Testimony of Harriet Bouslog Sawyer.)

and so far as my recollection was concerned, Judge Peters. I had been contented completely as to what I said and I had nothing further that I could have added to it. And I felt since an investigation was going to be made, it was better for me not to go to people and say—you know, make it look—appear as if I was trying to line up people on my side—but let an impartial investigation be made. And it is my understanding that Mr. Barlow brought in only two or three out of fifty or sixty people who heard this —who were interrogated.

Mr. Barlow: May I make a statement to the Committee? [326]

The Chairman: Surely——

Mr. Barlow: Rule 42-B has to do with criminal intent.

Mr. Anthony: Can't we get on with the case?

The Chairman: If this is part of your argument——

Mr. Barlow: No, it isn't part of the argument. Everybody is talking 42-B and why she didn't do anything and why I didn't do anything. I want to explain to the Court what Rule 42-B is.

The Chairman: I think we can get on with it.

Mr. Peters: I don't think we are concerned at the present time.

The Chairman: Let's get on with the interrogation.

Mr. Barlow: Very well.

(Testimony of Harriet Bouslog Sawyer.)

Further Cross-Examination

By Mr. Barlow:

Mr. Barlow: In other words, Mrs. Bouslog, the Government, the Court or anyone else did not proceed against you under Rule 42-B of the Federal Rules of Criminal Procedure, is that right?

The Witness: Not in the two years since that has happened, no.

Q. Now, Mr. Matsuoka testified, and his notes indicate that you made a remark to the effect—and I am quoting: "There's no such thing as a fair trial in the Smith Act case. All rules of evidence have to be scrapped before [327] the Government can make a case." Did you make a statement to that effect?

A. As I told Judge Wiig on December 16th, I did say, "There is no such thing as a fair trial in the Smith Act case." As a matter of fact, Judge Hand in the United States vs. Dennis says exactly and virtually the same thing. As far as the second part of that statement is concerned—what is that?

Q. "All rules of evidence have to be scrapped or the Government can't make a case."

A. No, as I told Judge Wiig on December 16th, I think Mr. Matsuoka has taken, shall we say, editorial leave. And he doesn't take shorthand. He was just writing. But at any rate, my talking about the rules of evidence had to do with explaining the difference between the rules of evidence in a con-

(Testimony of Harriet Bouslog Sawyer.)

spiracy case and in an ordinary criminal case—and pointing out why the Government used the conspiracy charge, rather than moving under the Smith Act itself—because they had a greater latitude under the rules of evidence in conspiracy than they would have if they had actually charged a violation of the Smith Act.

Q. But you do admit making the statement, "There's no such thing as a fair trial in the Smith Act case."

A. I told Judge Wiig that I made that statement on December 16th and I still remember—have a clear recollection of having made that statement.

Q. And do you realize there was a Smith Act case in progress at that time? [328]

A. There were several Smith Act cases.

Q. I am talking about one involving you—where you were attorney of record.

A. Oh, yes. I was making a report. I was speaking in connection with informing Union members about the Smith Act.

Q. So when you told them that there was no such thing as a fair trial in the Smith Act, you were indicating to them that there was no such thing as a fair trial going on in Honolulu on that date. Is that right?

A. It was a Smith Act case, but I wasn't talking about this case. I was talking about the Smith Act and the Smith Act in general.

Q. That was the inference that you intended or wished to convey to the members present—that

(Testimony of Harriet Bouslog Sawyer.)

there was in progress a Smith Act case in Honolulu when there was no such thing as a fair trial in any Smith Act case.

A. That is exactly right—no such thing as a fair trial in any Smith Act case.

Q. And there was a Smith Act case going on at the time, is that right?

A. That's right. That is what Justice Black said in his dissenting opinion.

Q. We are not interested in what Justice Black said. He is not here today.

A. But that is what he said in——

Q. No, no. We are just interested in what you say. [329]

A. But that is what he said in the dissenting opinion.

Mr. Peters: I would like to ask—what was the source of your information that there was no such a thing as a fair trial under the Smith Act?

The Witness: Well, Judge Hand explained—and I think I pretty much said the same thing—Smith Act case is because for a number of years that the reason why there can't be a fair trial in the newspaper writers and magazine articles have been talking the danger of Communism and about how dangerous it is to the United States, and the Government has carried on—Government committees have attempted to carry on educational programs about how dangerous Communism is; so that I explained to Judge Wiig that I followed this statement—not with the statement that Mr. Barlow

(Testimony of Harriet Bouslog Sawyer.)

quotes there, but with the statement of saying that because of this long-time history of the education of the dangers of Communism, the average person in the street gets frightened when they hear the word "Communism."

Judge Peters: Well, now, what have we got so far. A matter of common repute.

The Witness: Yes.

Mr. Peters: Coming down through a period of time of sufficient duration to make its impression upon the public.

The Witness: That's right.

Mr. Peters: All right. Now, you spoke of Judge Hand. Is that Judge Learned Hand?

The Witness: Yes. [330]

Mr. Peters: Was there a decision by him or anyone connected with him?

The Witness: Yes. That was in United States vs. Dennis. In that case—that was in the original, the first Smith Act case that was brought in 1949, and when it got up to the Court of Appeals, they had asked for a continuance until the hysteria against Communism died down. And Judge Hand said, "Well, we might just as well recognize the fact that they probably never would be able to have a fair trial—never be able to get rid of this atmosphere in respect to Communism.

Mr. Peters: Now, you are talking of a concrete decision of a Circuit Court of Appeals of what circuit?

The Witness: Of the Second Circuit.

(Testimony of Harriet Bouslog Sawyer.)

Mr. Peters: Of the Second Circuit in which Judge Learned Hand was the author?

The Witness: Yes.

Mr. Peters: All right. Now, what else had you in mind?

The Witness: Justice Black in a dissenting opinion in Dennis vs. United States, in which he said, "We will have to wait until we get into calmer times before we can get rid of the Smith Act. He, of course, felt that the Smith Act violated all the basic liberties of the First Amendment and personal freedoms. And Justice Douglas—also dissenting in the Smith Act. I felt that to this audience, I was just paraphrasing the language of these judges, and that therefore [331] I had a right to say this, Judge Peters.

Mr. Peters: Is there any other source of information besides what you have given?

The Witness: Oh, there are—there have been—well, I would say at least thirty or forty Law Journal articles. I can recall having to do with the loyalty oath program and the general Dean Griswold articles on the right to invoke the Fifth Amendment. There have been a whole series of them. He has been writing for some time. Professor Emerson of Yale University has written a number of articles. Professor Steele Connager from Columbia University. I was really quoting a whole volume of textbooks writers and Law Review commentators and general magazine commentators, because there are people in this country who have taken

(Testimony of Harriet Bouslog Sawyer.)

a very—and the American Civil Liberties Union—that have taken a very strong, unequivocal position against the Smith Act, and they have said in much stronger words than I have used, Judge Peters, that there can't be a fair trial.

Mr. Peters: What was the idea of telling this audience at Honokaa about this? This general atmosphere epitomized in these different Law Journal articles and Judge Hand's decision, and the decisions of both Black and Douglas. What was the purpose, your purpose, in explaining that situation to this audience down there at Honokaa?

The Witness: To give them enough information so that they would come to the conclusion that the Smith Act was a bad law which should be repealed. [332]

Mr. Peters: Oh, you didn't—you weren't explaining to this defense committee that was collecting for the purposes of Mr. Hall's defense.

The Witness: There was no collection.

Mr. Peters: Well, they were handling the defense, were they not?

The Witness: As far as I know——

Mr. Peters: As far as I know that is what Mr. Hall said. He said the committee still had some money.

The Witness: That's right. That's all I know.

Mr. Peters: I don't get the reason—what reason you had, other than to criticize the present pending case before the United States District Court, unless

(Testimony of Harriet Bouslog Sawyer.)

it was for the purposes of collections or something of the kind.

The Witness: No, my whole purpose was—I was asked to speak. I was a member of the defense council, member of one of a group of defense councils who was defending Jack Hall. Mr. Symonds and I were associated in the defense of Jack Hall, and it was more or less an accident that I went on that particular time instead of someone else going. I was asked to explain what the Smith Act is and what is the nature of the charge under the Smith Act conspiracy. And my speech was directed——

Mr. Peters: What was the nature of the charge against Jack Hall. Wasn't it?

The Witness: The nature of the charge against Jack Hall, that's right. [333]

Mr. Peters: Yes. That was an actual pending case——

The Witness: That's right.

Mr. Peters: In which you were appearing for the defendant, Jack Hall.

The Witness: That's right, your Honor. That's right, Judge Peters. I was explaining. I wasn't talking about the case over here except incidentally in giving a factual report of what had actually gone on. The burden of my remarks was—what is this Smith Act? What is a charge like under the Smith Act. What are they accusing Jack Hall of? And trying to explain that to a group of laymen. And—not to a group of laymen. It was my understanding

(Testimony of Harriet Bouslog Sawyer.)

that these were all—and certainly it gave that impression—that I was reporting to an audience of Union people, although it was a public meeting in a big theatre.

Mr. Peters: Then, as far as your speech was concerned, a portion of it—according to your statement—was directed to the pending case.

The Witness: I—if—have you had a chance to read the statements I made to Judge Wiig?

Mr. Peters: No, I am just taking your statement that you have made this morning in connection with—the proposition is that Jack Hall testified that he was the one that criticized the pending trial and you spoke in generalities. Now, this morning you have testified that you spoke in generalities in relation to this particular case pending before Judge Wiig. [334]

The Witness: I spoke in relation to this particular case in the sense that I made a factual report of four—I think I picked four—I told the audience about how—what Paul Crouch had testified to. In other words, merely reported to them what a witness before Judge Wiig's court had said. Another illustration that I think I recall from having refreshed my recollection was—I told the audience about the testimony of a person by the name of Johnson who, as I understand it, who had testified in this trial. And those were merely factual reporting, as I viewed it.

Mr. Peters: Well, you criticized their evidence along the line——

(Testimony of Harriet Bouslog Sawyer.)

The Witness: No, I was reporting what they had said. What they had said in the Federal Court room, and using it to illustrate what I was saying about the Smith Act—but merely a factual report of what they had said, Judge Peters—because it was my understanding that I had a right as counsel to make fair comment upon a case. And that was my understanding of my rights.

Mr. Dodge: Do I understand you to say, then, that you made those statements about this Act in those four illustrations for the purpose of showing the unfairness of the Smith Act trial?

The Witness: No, for the purpose of showing what a Smith Act trial was like.

Mr. Dodge: Wouldn't that also show the unfairness of the Smith Act trial here—I mean if they were used as [335] illustrations to show the unfairness of a Smith Act trial, wouldn't they be equally applicable to a lay audience, more particularly to show the unfairness of this trial here.

The Witness: I think anyone who sat in the Court room and listened to the testimony——

Mr. Dodge: Well, most people hadn't been in the court room.

The Witness: That's right. I think that it had undoubtedly—hearing the mere fact that Paul Crouch testified about what he said to Russian generals in Moscow would impress anyone. They wouldn't like to have that kind of evidence brought out in a trial against them when they weren't

(Testimony of Harriet Bouslog Sawyer.)

there, when Paul Crouch was there with the Russian——

Mr. Anthony: Mr. Chairman, I forgot I have to put in a telephone call. May I be excused?

The Chairman: We will take a short recess.

(Recess.)

Mr. Peters: May I go back just a minute, Mrs. Bouslog. I am in a sort of a haze as a lawyer how far you can insult a Judge, and as a Judge, I have been insulted by experts. I just don't know when insult ends and a legitimate comment begins. Have you got authority or did you look up authority on your right to comment generally on the Smith Act?

Mr. Anthony: Judge, I think you might ask her whether or not she made this investigation before she made this speech. She may have some authorities now. [336]

Mr. Peters: Did you make an investigation before this speech at Honokaa?

The Witness: I made no investigation before the speech at Honokaa in relation to that, but I had been in connection, generally, with the free speech field and become familiar with the Supreme Court decisions in Craig vs. Harney; and Bridges v. California, and Pennekamp vs. Florida—in which the Supreme Court had laid down the principals of——

Mr. Peters: These authorities are included in your brief?

(Testimony of Harriet Bouslog Sawyer.)

The Witness: These are the Supreme Court decisions.

Mr. Anthony: Let's not get into any discussion of law, if possible. I will subside. I am through.

Further Cross-Examination

By Mr. Barlow:

Mr. Barlow: Now, you indicated in response to some queries by Judge Peters that you were making a report at Honokaa?

The Witness: It was in the nature of a report, yes.

Q. Nature of a report on what? What were you reporting to the members present at that meeting?

A. I have already stated I was telling them about the general nature of the Smith Act—what the Smith Act was and the charges. What is the nature of a charge under the Smith Act, and particularly conspiracy charge. [337]

Q. And you also indicated to the people present on that occasion what was going on at the pending Smith Act trial, is that right?

A. If you recall, Mr. Barlow, the trial hadn't been going on very long, and I told Judge——

Q. Just a minute, please.

A. I am trying to answer your question.

Q. May I ask the Chairman to please instruct the witness to answer the questions? It isn't what I recall. We are here to find out what Mrs. Bouslog recalls—not what I recall. May I ask the question

(Testimony of Harriet Bouslog Sawyer.)

be read and the witness instructed to answer it, if it is proper?

(Question read by the Reporter.)

A. I recall telling four factual things that had happened in the Smith Act trial up to that point.

Q. In other words, you related Crouch's testimony in your——

A. I summarized Mr. Crouch's testimony.

Q. You summarized Mr. Crouch's testimony?

A. Extremely briefly.

Q. In order to show the people present what kind of testimony was going on at the trial?

A. Yes.

Q. And you summarized Johnson's testimony with the same view? A. Yes.

Q. Was there anybody else's testimony that you summarized? [338]

A. I have no present recollection of any—it may be that in the transcript there is more, but I have no present recollection of anything else.

Q. Did you make this statement: "Mr. Johnson said he did not tell the names of the books, but just showed Jack Hall the duffel bag; so Jack Hall violated the Smith Act because he saw a duffel bag with some books on overthrowing the government in it. It's silly. Why does the government use your money and mine to put people in jail for thoughts?"

A. I made no statement in those words or any words approximating that, Mr. Barlow.

(Testimony of Harriet Bouslog Sawyer.)

Q. This doesn't reflect at all what your statement was on that occasion, is that right?

A. It sounds to me like Mr. Matsuoka—I did make a statement concerning Mr. Johnson showing Mr. Hall a duffel bag containing books and I explained on the basis of Mr. Hall's having seen the duffel bag, the books contained in the duffel bag had been admitted into evidence.

Q. You criticized that admission?

A. I did not criticize it. I merely stated the fact that it had been—that that had happened.

Q. Did you make a statement: "Why does the Government use your money and mine to put people in jail?"

A. I have absolutely no recollection of making that statement, and I had none two days afterwards.

Q. Did you make the statement: "The government has carried [339] on a barrage of propaganda for many years and expects people in the jury to have hysteria. Just hearing about communism is enough to jail."

A. No, I made no such statement. I think that Mr. Matsuoka there is confused with what I said about the reason why it is impossible to get a fair trial in the Smith Act case, but there has been such a barrage of propaganda from newspapers and magazines and writers and government agencies and government committees that it is impossible to get a fair trial as soon as the issue of communism is injected into the trial.

(Testimony of Harriet Bouslog Sawyer.)

Q. Did you indicate in your colloquy with Judge Peters that just hearing about communism was enough to put people in jail? Did you make statements along that line?

A. I have no recollection of saying that to Judge Peters or any other time. "It is enough to put them in jail." It doesn't sound like my phraseology.

Q. Something like that?

Mr. Anthony: Something like what?

The Witness: I have just explained what I did say, Mr. Barlow. I have no recollection of saying that hearing about communism was enough to put people in jail—in those terms.

Mr. Barlow: Did you refer in your speech to the habeas corpus movement made in the Majors-Palakiko case?

The Witness: Yes, I did. I believe that was one of the illustrations I used about the difference between the rules [340] as applied to conspiracy cases and as applied to ordinary civil and criminal cases.

Q. And in the Majors-Palakiko habeas corpus case, did you say that a woman came to you—well, I will quote the report so there will be no misunderstanding. I am reading from the exhibit that Mr. Matsuoka——

Mr. Anthony: The transcript?

Mr. Barlow: No.

Mr. Anthony: Well, let the witness see the exhibit then.

(Counsel handing document to the witness.)

(Testimony of Harriet Bouslog Sawyer.)

The Witness: Those are not my words. The substance, the fact that I was in the Majors-Palakiko case—that in that case the Supreme Court of the Territory had refused to permit Mrs. Hughes' testimony; that Vernon Stevens had told her that he had beaten Palakiko was not permitted by the Supreme Court; whereas in the Smith Act cases in general, as well as in this Smith Act case, people who had been many years away and had never seen this defendant were permitted to testify.

Mr. Barlow: In other words, would it be fair to say that you paralleled that with the phrase that Mr. Matsuoka attributes to you: "With the same situation, a Federal judge, sitting on a Federal Bench, permits Crouch to testify about 27 years ago what was said then"?

The Witness: I used the Palakiko-Majors case as a contrast to Mr. Crouch's testimony and the hearsay testimony [341] in the conspiracy case.

Q. That Judge Wiig was allowing in the present Smith Act case, is that right?

A. The motions hadn't been argued yet.

Q. No, but that Judge Wiig was allowing in the present Smith Act case? A. Yes, he was.

Q. That is what you were critical about? Is that right?

A. I was reporting. I left that to the audience.

Q. Were you reporting to your client or to whom? A. By "reporting," I meant relating.

Q. You were relating what was going on in the pending Smith Act case, right?

(Testimony of Harriet Bouslog Sawyer.)

A. I related what Mr. Crouch—the summary of Mr. Crouch's testimony, yes, Mr. Barlow.

Q. And you contrasted that with the Palakiko-Majors case?

A. I contrasted the use of hearsay testimony in the Majors-Palakiko case where life was involved, in contrast to the Smith Act case where 27-year-old testimony was being permitted.

Q. You were talking to a group of plantation people, is that right?

A. So far as I can recall, yes, it was a group of plantation people from Honokaa.

Q. So most of your phraseology and use of words was in language that plantation people would understand, am I right?

A. I tried, Mr. Barlow, and it is hard for a lawyer to talk so a layman can understand. I am afraid I am not always able [342] to achieve the desirable.

Q. You quote Justices Hand and Douglas. You weren't talking to these plantation people as you would to either one of these legal justices?

A. No, I wasn't.

Q. In other words, you were talking in lay language so they would understand what was going on at that particular time?

A. I was trying to make myself understood by the audience for which I was speaking.

Q. Did you make a statement: "There is no fair trial in the case. They just make up the rules as they go along"?

(Testimony of Harriet Bouslog Sawyer.)

A. No, I made no such statement.

Q. But you did say there was no such thing as a fair trial in the Smith Act case?

A. In the Smith Act case, yes.

Q. Did you say to your audience: "Unless we stop the Smith Act trial in its tracks here there will be a new crime. People will be charged with knowing what is included in books, ideas, et cetera"?

A. No, that is not my phraseology. I did state in substance something that is reminiscent of that. I said that the Smith Act—continued prosecutions under the Smith Act can lead to a new crime of reading and thought control, and I quoted, as I told Judge Wiig—I quoted the exact language of the prosecutor in the Smith Act trial in Los [343] Angeles, where he had said that all the defendants did was ask people to read, read, read, and they never told people not to read anything. And I said that I felt that the Smith Act would be repealed as soon as people understood what the Smith Act was.

Q. Did you ask the audience to go out and explain what a vicious thing the Smith Act was; that the people were being tried for books that were written years and years ago—or something on that line?

A. Yes, I think it was something along that line.

Q. Now, Mrs. Bouslog, on July 2nd, 1953, you were interrogated by Judge Wiig, were you not?

A. Yes.

(Testimony of Harriet Bouslog Sawyer.)

Mr. Peters: What date is that?

Mr. Barlow: July 2nd, 1953.

The Witness: Yes.

Q. Mr. Gladstein was interrogated by the Court?

A. I believe that is right. I don't know that that is my present recollection of the exact date. It was some time following the filing of the Motion for New Trial.

Q. Well, I show you what purports to be a copy of the transcript of the proceedings. I won't vouch for its accuracy or correctness, because it is just a copy. It was July 2nd.

A. It was the day following July 1st—I have no present recollection.

Q. You and Mr. Gladstein were interrogated by the Court, right? A. Yes. [344]

Q. And the Court on that occasion was asked by Mr. Gladstein just in plain English what it was all about, is that right?

Mr. Anthony: May I have the reference to the transcript? This witness wasn't there.

Mr. Barlow: Would you please peruse that?

The Witness: You want me to read the transcript?

Mr. Anthony: Show her the page you want to interrogate her about.

Mr. Barlow: Mine is Page 10, but yours isn't Page 10. Were you present in court on that occasion?

The Witness: Yes, I was, Mr. Barlow.

Q. Do you remember Judge Wiig asking you

(Testimony of Harriet Bouslog Sawyer.)

about Mr. Tate? A. Yes.

Q. And about the Fuller affidavit?

A. No, I don't believe he mentioned the Fuller affidavit. As a matter of fact, there is absolutely no connection between Mr. Tate and the Fuller affidavit.

Q. Well, that remains to be seen. But Judge Wiig did talk to both you and Mr.——

A. Judge Wiig interrogated me, as you recall, only with respect to Mr. Tate on that date. The only thing he asked me about the Juror Fuller was whether I had talked to any other jurors except Mr. Fuller—to which I replied that I had not.

Q. You remember Judge Wiig asking this question—just so the record will be straight.

(Counsel conferring.) [345]

Q. To the transcript of the proceedings, July 2nd and 3rd, one to 95 pages, at Page 16, I will ask this question. The Court asked you this question: "And I will ask this question, Mrs. Bouslog: Besides the Juror Fuller, have you had occasion to talk with any of the other jurors in this case since June 19th"?

A. Yes, I recall the Court asking that question.

Q. So you did state at the time on that occasion that you had talked with the Juror, Fuller, by inference—"besides the Juror, Fuller"?

A. What?

Mr. Anthony: She had already filed the Affidavit in Court.

The Witness: I had filed the affidavit in court

(Testimony of Harriet Bouslog Sawyer.)

the day before, and I stated to Judge Wiig on this occasion that I had talked to no other juror except Juror Fuller.

Mr. Barlow: So, in effect, you told Judge Wiig on that day that in effect you had talked to Juror Fuller?

The Witness: But I had filed my affidavit.

Q. And then Judge Wiig interrogated you about a Mr. Tate, isn't that right?

A. No, prior to that time he interrogated me about Mr. Tate, I believe.

Q. At some time on that date, he interrogated you about Mr. Tate, is that right? A. Yes.

Q. He asked you whether Mr. Tate had made any reports to [346] you, is that right?

A. Yes.

Q. You did not answer the Judge on that occasion, is that right?

A. The transcript speaks for itself, Mr. Barlow.

Mr. Anthony: This is irrelevant to anything here.

Mr. Barlow: I want to bring to the Committee's attention the atmosphere in the courtroom on that date. The Judge interrogated Mr. Gladstein about approaching a witness; interrogated Mrs. Bouslog —and, as I have just read these questions, she admitted she didn't approach anyone beside the Juror, Fuller. And Judge Wiig had asked her questions about a man by the name of Tate. And then I will read from the transcript the reasons for

(Testimony of Harriet Bouslog Sawyer.)

Judge Wiig interrogating Mrs. Bouslog and Mr. Gladstein.

Mr. Dodge: Does that have something to do with this charge on the Fuller affidavit?

Mr. Barlow: That's right.

Mr. Anthony: That is my point. There is no charge here that this attorney engaged in any pattern of—there is a charge here that she took the affidavit of David Fuller under circumstances alleged by the Complainant to be unprofessional. This other thing is not relevant to any proceedings here.

Mr. Barlow: Judge Peters indicated that he didn't know if there was anything wrong in taking the affidavit of a juror. [347]

Mr. Anthony: We can argue that later.

Mr. Barlow: May I finish? And I think that probably Mr. Gladstein and Mrs. Bouslog indicated to the Court that they didn't think there was anything wrong. In fact, they were a little surprised at Judge Wiig's questions. And Judge Wiig indicated to them why and by what authority he was questioning them. That is what I am relying on.

Mr. Anthony: That is argument of law.

The Chairman: May we go back to the question that was asked, Miss Reporter?

(Question read by the Reporter.)

The Chairman: What is the relevance, Bill?

Mr. Barlow: The relevancy is that here the Judge is speaking to first Mr. Gladstein about in-

(Testimony of Harriet Bouslog Sawyer.)

terrogating a juror. Then he talks to Mrs. Bouslog and says in effect: "Mrs. Bouslog, have you interrogated anybody besides the Juror, Fuller?" And Mrs. Bouslog says, "No, I haven't." Then the Judge says, "Well, do you know Mr. Tate?" Mrs. Bouslog says, "Yes." "What are your relationships?" And the testimony here speaks for itself as to what her answer was. Then the Judge says to her, "Did he make any reports to you?" And she made an answer and then Mr. Gladstein popped up and wanted to know what it was all about. And then Mrs. Bouslog wanted to confer with her co-counsel, and this is one li'le ball of wax. They are all jumping up and speaking and Wirin gets into the picture; [348] Gladstein gets into the picture, and they all want to know what it is all about.

Mr. Anthony: I don't see any relevance thus far, Mr. Chairman.

Mr. Barlow: Judge Wiig says, "Well, I will tell you what it is all about." And he reads to them from a case wherein the holding of the case is to the effect that lawyers are not to speak to jurors.

The Chairman: Isn't that law that would be normally presented to the Committee?

Mr. Dodge: I can't see what Mr. Tate has to do with the Fuller affidavit. That is the only thing.

Mr. Barlow: Aren't we trying this person's character?

Mr. Anthony: No, we certainly are not. We are trying a specific——

(Argument.)

(Testimony of Harriet Bouslog Sawyer.)

The Chairman: For the information of the Committee, who is Mr. Tate?

Mr. Anthony: Nobody knows. No evidence of it and it isn't relevant.

The Chairman: I mean, was he a juror?

Mr. Barlow: I know who he was and Mrs. Bouslog knows who he was, and I would rather have Mrs. Bouslog tell who he was.

Mr. Symonds: He is not a juror?

Mr. Barlow: He is not a juror, no, sir. [349]

Mr. Anthony: No relevance in this proceeding.

Mr. Barlow: Whether a lawyer does a thing directly himself or whether they do it by an agent——

Mr. Anthony: I object to the inference that Mrs. Bouslog did anything through any agent.

(Argument.)

Mr. Barlow: We get back to that old question that I feel has never been decided as to the first charge—as to whether I can show other speeches that Mrs. Bouslog made consistent with the speech that she made at Honokaa. And this is an attempt by the Bar Association to show that Mrs. Bouslog not only approached Juror Fuller, himself, but through an agent approached other jurors—or, at least, one juror—which hinges back to the question of her character. Whether the whole thing is admissible, it is up to the Committee to make a decision.

Mr. Peters: Do I understand, Mr. Barlow, that Mr. Tate is an agent of Mrs. Bouslog?

(Testimony of Harriet Bouslog Sawyer.)

Mr. Barlow: I might answer that from my knowledge. I don't want to be criticized.

Mr. Peters: I am asking you a direct question.

Mr. Barlow: It is the Bar Association's contention that Mr. Tate was working for Mrs. Bouslog, yes, and that he interviewed a juror with Mrs. Bouslog's knowledge and consent.

Mr. Symonds: Did he interview Mr. Fuller?

Mr. Barlow: No, he didn't interview Mr. [350] Fuller.

Mr. Anthony: This has no relevance at all to anything in this proceeding. If it were, it would be part of the case in chief, obviously.

Mr. Barlow: All right. Why don't I withdraw the Tate incident and just read to the Committee Judge Wiig's comments to all Counsel as to why he interrogated Mrs. Bouslog about Fuller and Tate?

The Chairman: Is that something that could be filed with the Committee?

Mr. Anthony: We will object to it. I will object to it on the ground it isn't relevant, as clearly will appear when the Committee gets the document.

Mr. Barlow: I take it that the Committee will be a little consistent, myself. In the Honokaa speech, it was very relevant as to what Judge Wiig said, and all of a sudden it becomes immaterial here as to what Judge Wiig said when——

(Argument.)

Mr. Barlow: I want to read to the Committee

(Testimony of Harriet Bouslog Sawyer.)

Judge Wiig's reasons for interviewing Mrs. Bouslog about talking to a juror and Mr. Greenstein about talking to jurors.

Mr. Peters: This committee is interested in what Judge Wiig says on the propriety of interviewing jurors just the same as it would be interested in the decision of any other judge as to what he had to say about interviewing jurors. Unfortunately, lawyers don't always accept the opinion of judges. However, they are pretty material—— [351]

The Chairman: Mr. Barlow, will you have a copy of that made and submitted to the Committee, and it will be accepted subject to Mr. Anthony's motion to strike.

Mr. Anthony: On the ground it isn't relevant.

The Chairman: I think we better proceed.

Mr. Barlow: All right. I will follow the Committee's suggestion, but I want to ask Mrs. Bouslog some more questions along the same line.

The Chairman: Proceed.

Mr. Barlow: Mrs. Bouslog, after or during this colloquy between Mr. Gladstein, Mr. Wirin, you and Judge Wiig, didn't Judge Wiig indicate to Counsel at the Counsel table the reasons why he felt that Counsel should not have approached the jurors?

Mr. Anthony: I object to that on the ground it is irrelevant, and the Committee has already ruled that they are going to receive this document—indicated that they would over objection of mine that

(Testimony of Harriet Bouslog Sawyer.)

it is irrelevant. There are arguments of law in here by Judge Wiig.

Mr. Barlow: Judge Peters asked Mrs. Bouslog if she made any search of authorities as to the propriety of making a speech at Honokaa, and apparently there is a question as to whether Mrs. Bouslog has made any investigation of authorities with relation to investigating or talking to or interrogating jurors.

The Chairman: It seems to me if the answer to that question appears in the excerpt you are going to give us, [352] we are not going to add anything to the record by asking her whether or not she said those things.

Mr. Barlow: Except under certain circumstances, the record itself may be inadmissible, and I am not asking the witness whether she recalls the Judge telling her why he felt——

The Chairman: Very well. If it is for that purpose.

Mr. Anthony: The rule of admissibility will be just the same. There is no doubt that the colloquy occurred. I will stipulate to that. The question is whether or not the document is admissible. It is just as simple as that. It isn't particularly vital either, I might add.

Mr. Dodge: Didn't it all happen after——

Mr. Barlow: What difference does it make?

Mr. Anthony: All the difference in the world.

(Argument.)

(Testimony of Harriet Bouslog Sawyer.)

The Chairman: It seems to me, Mr. Barlow, her answer to that question isn't going to assist the record any.

Mr. Barlow: Do you feel, Mrs. Bouslog, that you could go and interrogate jurors after a verdict?

The Witness: Of course. I had done it before, and I had known other lawyers in the Territory who had done it. As a matter of fact, the rule in the Territory has been that there is no objection to it unless there is some misconduct in the course of [353] inquiries.

Q. Have you on prior occasions made searching inquiries of jurors after a verdict?

A. No, as a matter of fact, except for the Smith Act, I have always won my jury cases. Oh, the Zimmerman case.

Mr. Peters: You make no distinction, do you, between affidavits showing misconduct and affidavits secured to impeach the jurors on a verdict?

Mr. Barlow: Well, I might say in answer to that the Courts are somewhat divided on whether a lawyer can or cannot approach a juror after a verdict has been rendered.

Mr. Anthony: The books are filled with thousands of cases—affidavits secured by lawyers. They are filed in the court.

Mr. Barlow: Do I have the right to say anything without an interruption, or do I have to be continually interrupted?

Mr. Anthony: Mr. Barlow interrupted an inter-

(Testimony of Harriet Bouslog Sawyer.)

rogation by Mr. Justice Peters, which was a question propounded to the witness.

The Chairman: I think he asked Mr. Barlow the question.

Mr. Peters: I asked Mr. Barlow the question.

Mr. Anthony: I am sorry. There appears to be a general conduct here of approaching the jurors after a verdict.

(Argument.) [354]

Mr. Peters: I don't think we are getting anywhere, I will withdraw the question.

The Chairman: Very well, let's proceed with the interrogation.

Mr. Barlow: Do you recall the occasion that you went to see Mr. Fuller?

The Witness: I do.

Q. Do you recall what day it was?

A. I believe it was June 26th. It was a Friday evening.

Q. Under what circumstances did you go out to see Mr. Fuller?

A. I was at my home, I believe I was having dinner when I received a telephone call from Ellen Cabreros.

Q. Had you known Mrs. Cabreros before that?

A. It is quite possible I had seen her at the Union hall in connection with Union busines, and I am sure I have, but I have no conscious recollection of having known her as an individual prior to this time.

(Testimony of Harriet Bouslog Sawyer.)

Q. What did Mrs. Cabreros say to you when she called you?

A. She said that her brother was very ill and would I please come over to the house. She identified her brother as being—she identified herself as being a Union member, and then said her brother was the juror, and asked me to come over to the house.

Q. Did she indicate at that time why she wanted you to come over?

A. She said he was very ill. Other than her brother being [355] very seriously ill, she did not.

Q. You didn't query her any further?

A. She seemed very upset, so I didn't. I more or less accepted her word and said yes, I would come.

Q. At that time, did you have any qualms about talking to a juror?

A. Absolutely not. I had had experience in the Zimmerman case—United States vs. Zimmerman—of interviewing numerous jurors for the purpose of filing affidavits in that case, so it never occurred to me that there was any reason why I should not.

Q. You didn't think that you should report Mr. Fuller's illness to Judge Wiig?

Mr. Anthony: I object to that. The witness did. She filed an affidavit.

Mr. Barlow: May I ask that the question be answered?

The Witness: You mean before I went to his house?

(Testimony of Harriet Bouslog Sawyer.)

Mr. Barlow: No, you testified that Mrs. Cabreros called up and said that Fuller was sick. Would you come down and see him—in effect.

The Witness: Yes.

Q. Now, at that time you said you had no qualms about talking or interviewing the juror, and then I asked you at that time why you didn't think of calling Judge Wiig to tell him that one of the jurors was sick.

A. Well, it did not occur to me at that point, Mr. Barlow. [356]

Q. It did not occur to you?

A. It did not occur at that point, no.

Q. Then you went down to see Juror Fuller, is that right? A. Yes.

Q. Then what happened?

A. The Fuller house has a little square porch on the front. There is a door—one which goes into the front bedroom and one goes into the parlor. My recollection is that Ellen came to the door and let me in the parlor and introduced me to her sister-in-law, Helen Fuller, who was crying. And there were two of the Fuller children. I believe the little girl, who is here, and I think there was one of the smaller ones, and Grace Oshiro were there. But the two Fuller children and Ellen and Mrs. Fuller were all terribly emotionally upset. They were all crying. It was a very strange situation. Mrs. Fuller told me—started to tell me about what had happened—how her husband had been ill. And then I believe that she ushered me into the bedroom to show me—

(Testimony of Harriet Bouslog Sawyer.)

to show me how he was. She said he hadn't moved or hadn't said anything since he had lost his voice from shouting, and my recollection is that we walked into the bedroom, but no one sat down at that point; that Mrs. Fuller and Ellen and Grace were on one side of the bed. Mr. Fuller was lying so that his head was at the foot of the bed—so that the bed was kind of catty-corner in the [357] room. And it was a rather small room; so it wasn't too far away from the entrance to the living room through the hall, and Mr. Fuller was lying there in what appeared to be a state of very serious illness. He was saying nothing and just didn't move. And he did look very ill. Almost motionless. He had his hands crossed on his chest, as I recall, and then my recollection is that we went back to the living room because I asked Mrs. Fuller if the doctor had seen her husband, and she said she was expecting the doctor momentarily. And the doctor was ushered directly into the bedroom at the time when I was in the parlor; so that I never saw the doctor or never talked to the doctor.

And my recollection is that—is that the—that I didn't go in and actually speak to Mr. Fuller until after the doctor had seen him. That is my recollection. The affidavits aren't exactly artistically drawn, as I remember them. I mean they possibly could have been drawn with greater clarity, but, as I recall it, I didn't actually see him or have any conversation at all with him until after the doctor had seen him. And after the doctor had seen him,

(Testimony of Harriet Bouslog Sawyer.)

we went back into the room, and by that time, Mrs. Fuller had told me almost everything. She had described the rather gruelling events, as far as she was concerned and as far as her husband was concerned about the whole prior week.

And then I went into the bedroom again, and there was a chair on one side of the bed, very close to where Mr. Fuller's [358] head was, and I sat on that chair. And the others were standing, except Mrs. Fuller, I believe, was sitting in—the farthest away. And then the others were there and on this occasion, I just sat there looking at Mr. Fuller until he looked at me, and when he looked at me, I asked him if he recognized who I was, and he nodded that he did. And then in this rather whispering voice of his he said that I was Mrs. Bouslog and that he had seen me at the Smith Act trial.

Q. This is the first occasion?

A. This is the first occasion, yes. Well, I haven't —there really wasn't much else to the first occasion other than the many things that Mrs. Fuller told me that are incorporated in my affidavit—than Mr. Fuller saying that he would—I asked him if he wanted me to help him, and he said yes, he wanted help. He wanted to clear his conscience—was the words he used to me. He wanted to clear his conscience. And then he seemed to have this very strong sense of—Mrs. Fuller had more or less told me that he had this very strong sense of feeling of guilt; so then I asked him if he would like to see Jack Hall, and he said he would—he would like to

(Testimony of Harriet Bouslog Sawyer.)

see anybody who could help him clear his conscience.

Q. Why, Mrs. Bouslog, did you ask Mr. Fuller whether he wanted to see Jack Hall?

A. That is the Christian principle of atonement. If you have a guilt feeling and you have done somebody a wrong, and [359] that person says, "That's all right; I forgive you for it," then you would have taken the weight off his conscience, and Jack Hall was the only one he had mentioned. He had kept shouting, his wife said, "Jack Hall is innocent." Apparently Jack was the only one of the defendants that he had identified. So that was the reason I thought it would make Mr. Fuller feel better if he could see the person.

Q. In other words, you state that Mrs. Fuller told you that Mr. Fuller kept shouting, "Jack Hall is the only one"?

A. No, "Jack Hall is innocent" is what Mrs. Fuller told me Mr. Fuller kept shouting. "Jack Hall is innocent; Jack Hall is a good man."

Q. And you felt because he was shouting for Jack Hall, you should bring Jack Hall down?

A. No; he said he wanted to clear his conscience, and when you see the person you think you have done something wrong to forgive you, why, that——

Mr. Anthony: Just a minute.

(Chairman Pratt on the telephone.)

The Chairman: All right.

Mr. Barlow: Are you sure it was Mrs. Fuller

(Testimony of Harriet Bouslog Sawyer.)

that indicated to you that her husband wanted to get a clear conscience against a wrong, to straighten it out, and not Ellen Cabreros?

The Witness: All Mrs. Fuller did on the occasion of the first time that I saw her was to tell me what her husband [360] had said the prior—during the seven days that had elapsed since the verdict. That's all she did. And she told me it was her husband who kept saying that her husband wanted to get the clear conscience. I believe that Ellen Fuller Cabreros told me that her mother said—had told her that—to put it the way I got it was Mrs. Fuller said that Mr. Fuller had said in the preceding days that he wanted to get a clear conscience and he said that to me himself on the occasion of the first visit.

Q. What else did he say on that occasion?

A. I have gone over the affidavits very carefully and they do reflect the full thing. That is the only other thing I can recall presently at the moment, although there may be something else recorded in the affidavit. He said that the case was a frame-up and that he had sinned, and that he wanted to get a clear conscience; that he couldn't go ahead. I thought what he meant by that was that he couldn't live, he couldn't recover unless he got it off of his chest about a clear conscience.

Q. You stated then that on that first occasion you heard him say that the case was a frame-up?

A. His wife said to me that he had been shouting at the top of his voice for the preceding days

(Testimony of Harriet Bouslog Sawyer.)

that the case was a frame-up and I believe he said to me on that occasion—but whether it was that occasion or the next day that the case was a frame-up—I heard him repeat that several times—"frame-up," "frame-up." "This is a [361] frame-up."

Q. I ask you, Mrs. Bouslog, to look at your affidavit, Page No. 3, and see whether in your affidavit you indicated that Mr. Fuller at any time on that first occasion used the word "frame-up"?

A. Mr. Barlow, may I explain—I will answer the question first and then make my explanation. In the paragraph to which you have called my attention is nothing about the use of the word, "frame-up," and, frankly, if you notice Page 1, two and about the first two and a half pages, deal with the first visit. I was in the house on that occasion. I think it must have been at least an hour—so naturally there isn't recorded in here everything that was said or everything that went on or everything that Mr. Fuller said, and if you notice my affidavit, the affidavit as to this deals mostly with Mr. Fuller's description of what happened, what Mr. Fuller had done between the time of the Smith Act verdict on the 19th and the 26th when I went to the house. This affidavit is not exhaustive on the things that happened on the occasion of the first visit, but I think it reflects what I felt, at least at the time I drew the affidavit, was enough to fully apprise the Court of all the information that I had that the Court would need to determine whether

(Testimony of Harriet Bouslog Sawyer.)

or not we were entitled to a fuller investigation of the whole facts.

Q. Didn't you feel that if Mr. Fuller used the word "frame-up" on that occasion that it was a very important word and should be incorporated in your affidavit? [362]

A. Oh, it is incorporated in my affidavit in the sense that Mrs. Fuller said that he had said it many, many times in the preceding weeks, you see.

Q. I recognize that, but I am asking you of your conversations not with Mrs. Fuller, but with Mr. Fuller.

A. Well, I didn't say that I had much of a conversation with Mr. Fuller on the first occasion. Most of my conversation was with Mrs. Fuller and the things she told me about the—prior to the visit on the occasion. I thought he was so ill, physically ill, at any rate, that I wanted to—after the doctor saw him—to let him rest; and so I made arrangements to come again. He said he wanted me to come again, and then made arrangements, you see, to check back to find out whether he was well enough to see us the next day and if he still wanted it.

Q. In other words, it was your impression on that visit that he wasn't physically or mentally capable of engaging in an interrogation of his activities in the jury room?

A. This is my impression—that he wasn't physically able. I had no impression of any mental incapacity. He was just completely sick. His wife said he had scracely eaten or moved for the week

(Testimony of Harriet Bouslog Sawyer.)

and that he had been shouting and that he had lost his voice, and I felt that he was a very ill man, as I have stated in my affidavit, and, therefore, I was trying to comfort the family more than I was paying attention to that. I really didn't feel he was able to talk on that first occasion. [363]

Q. Under the circumstances, you felt that was not a fitting occasion to interrogate?

A. I didn't go there to interrogate him. I went there because I was called there, and when I found him ill, I did not interrogate him. I merely recorded what happened.

Q. Now, while you were there, did you hear any conversations between Mr. Fuller and Dr. Chang?

A. I was in the parlor, as they refer to it, at the time Dr. Chang was there.

Q. Did you hear any conversation between Dr. Chang and Mr. Fuller?

A. Yes; I think I recall Mr. Fuller sort of exploding. It sounded a little as if he were resisting the examination; that he was trying to get the doctor not to examine him. He was trying to explain to the doctor that the trouble with him was that he had been in this case that was a frame-up, and he kind of said it loud enough so that we could hear it in the parlor. But I couldn't understand all the words Mr. Fuller was saying and I couldn't understand everything Dr. Chang was saying. Actually, I was carrying on a conversation in the living room with the people who were in there while the

(Testimony of Harriet Bouslog Sawyer.)

doctor was examining. But I did definitely hear that word, "frame-up," while the doctor was there.

Q. Now, on Saturday morning, you and Mr. Hall went to see Mr. Fuller again?

A. Early Saturday afternoon.

Q. Approximately 1:00 o'clock? [364]

A. Yes.

Q. What prompted that visit?

A. Mr. Fuller had asked for help the day before and he had said he wanted me to help him and he wanted Mr. Hall—it was just for the purpose that I had explained—I thought it would make Mr. Fuller feel better if he heard Mr. Hall say he didn't hold anything against him—that he forgave him.

Q. On that occasion, did you interrogate Mr. Fuller?

A. Yes. We went in. The first thing—Mr. Fuller was up and dressed. And I remember that it was a great relief to me to see him looking so much better than he had the day before, because, frankly, from the day before, I was surprised. He was up and dressed and sitting in the living room. And after Mr. Hall discussed what happened in regard to him, Mr. Fuller looked at him for a long time, and then finally shook his hand and the first thing that Mr. Fuller wanted—he wanted to explain to Mr. Hall why it was that he had done what he had done, although he didn't think it was right. The first thing that Mr. Fuller said, the first thing he said was he thought he had to vote the way he did in order to protect the jobs of his two brothers and himself.

(Testimony of Harriet Bouslog Sawyer.)

And the next thing he seemed to particularly blame himself—it was rather strange. It seemed that he kept blaming himself for the verdict more than the other eleven jurors. He kept blaming himself, and he explained that he blamed himself because [365] he hadn't put up a fight in the jury room. He had voted, but he hadn't pitched in, and he referred to, he named one of the other jurors who had put up a fight, but he felt inexperienced.

Q. Who did he say put up the fight?

A. He named Mr. Peroff.

Q. Did you mention that in your affidavit?

A. No, I did not.

Q. You didn't mention the fact that he said to you that he put up a fight?

A. I did not use the names of any other jurors in this affidavit. I had thought Judge Wiig himself would call in Mr. Fuller and the other jurors and interrogate them to determine what went on in the jury room. So I felt it was more appropriate not to mention the names of any of the other jurors other than the one I was talking to direct.

Q. At the time you filed your affidavit, were you aware of the fact that Mr. Gladstein had interviewed Mr. Peroff?

Mr. Anthony: No evidence of that.

Mr. Barlow: This is cross-examination. I have the right to ask him a question that way.

Mr. Anthony: If the question is did Mr. Gladstein interrogate any juror, I will object to it on the ground it is not relevant.

(Testimony of Harriet Bouslog Sawyer.)

Mr. Barlow: I am asking this witness if she was aware at the time she filed this affidavit that Mr. Gladstein had interrogated Peroff. [366]

Mr. Anthony: I object on the ground it isn't relevant and assumes a fact not in evidence.

The Chairman: Objection sustained.

Mr. Barlow: But, in any event, you didn't allege in your affidavit that you filed with the Court that Mr. Fuller had mentioned the name of Peroff in your conversation with him?

The Witness: He mentioned the name of other jurors. We were there about an hour. I didn't mention the names of any of the jurors in the affidavit other than Mr. Fuller, even though Mr. Fuller mentioned not only Mr. Peroff, but other jurors.

Q. In connection with what?

A. In connection with telling about what went on in the jury room, misconduct in the jury room.

Q. But he did mention the names, specific names of people who, as you just stated, misconducted themselves in the jury room, is that right?

A. Yes.

Q. What were the names of the various people that he mentioned and what misconduct did he attribute to those people?

A. Those are not in the affidavit itself. However, the ones that I recall at the moment as I sit here are that Juror Abreu became very angry with anyone who didn't support the side of the Government and kept saying that he had to leave and he had to make this trip and would try to force any-

(Testimony of Harriet Bouslog Sawyer.)

one [367] who said no on behalf of the defendant or who asked for evidence that favored the defendants—would try to make them back down, or would —any one of the five jurors who voted for some of the defendants would try to force him to back down.

Q. Did he indicate how he would try to force the juror to back down? A. Yes, he said——

Q. How did Abreu try to force the jurors to back down?

A. He said it was he that proposed and insisted that there would be no secret ballots in the jury room and that anyone who voted for those defendants was put on the pan and forced to defend favoring the defendants, instead of having secret ballots taken in the jury room, and that was at Juror Abreu's insistence.

Q. Did you state that in your affidavit?

A. I said that there were no secret ballots taken in the jury room. I used no names at all of other jurors because, as I stated, Mr. Barlow, I expected Judge Wiig to call in the jurors and interrogate the jurors, and I thought it more proper that I put down, only in this respect of what went on in the jury room, exactly what Mr. Fuller told me and nothing else—not what he said about other persons.

Q. Am I to understand that your present testimony is that Abreu insisted that there be no secret ballots?

A. That, I believe, was Abreu and Fontaine. That is not in the affidavit. Fontaine and Abreu

(Testimony of Harriet Bouslog Sawyer.)

were particularly [368] insistent that there be no secret ballot.

Q. You did not state that in your affidavit?

A. No, I did not.

Q. You merely stated that he said that no secret ballots were taken, so everyone knew how each juror voted? A. Yes.

Q. Did you feel that that might be important to put in your affidavit?

Mr. Anthony: That was in the affidavit. That is in the affidavit.

The Witness: I didn't feel it was very important.

Mr. Barlow: About Fontaine?

Mr. Anthony: No, no names.

The Chairman: Gentlemen, I think we will have to recess the hearing. I am due at 11:00 o'clock at another meeting, which was of long standing, that I cannot postpone. It was some weeks ago.

Mr. Anthony: Can't we finish this up? Got any more questions?

Mr. Barlow: I have a lot.

The Chairman: I gather from Mr. Barlow's interrogation that this is going on for some time.

(Discussion.)

The Chairman: Supposing we adjourn then until Wednesday at 9:00 o'clock.

(The hearing adjourned at 11:07 a.m.) [369]

(Testimony of Harriet Bouslog Sawyer.)

December 8th, 1954—9:00 A.M.

The Chairman: Shall we proceed, Mr. Barlow?

Mr. Barlow: As best I remember, we were on the second day, is that right?

Mr. Symonds: We were just starting.

The Chairman: You had started on that.

Further Cross-Examination

By Mr. Barlow:

Q. Mrs. Bouslog, you went there with Mr. Hall on the second day, which was a Saturday?

The Witness: Yes, that is my recollection.

Q. And where did you find Mr. Fuller?

A. Sitting in the living room, fully dressed.

Q. And in what condition did you find Mr. Fuller?

A. Amazingly improved from the day before.

Q. And did you feel that he was so far on the road to recovery that you could interrogate him?

A. I felt he was perfectly rational and able to carry on a conversation.

Q. And you and he did carry on a conversation?

A. It was a three-way conversation, and in some of which his wife joined. She was in the living room when we first went there, and I believe also his daughter, and my recollection coincides with Mr. Hall—that she was standing in the doorway, but she left thereafter, but she did participate in some of the conversation that went on. [370]

(Testimony of Harriet Bouslog Sawyer.)

Q. Now, referring to your affidavit, Mrs. Bouslog, on page 4—may we have the affidavit of the witness, please?

(Counsel handing document to the witness.)

Q. Will you refer to the top of Page 4 where it says: "Mr. Fuller said to Mr. Hall that from the talk of guilty by other jurors in the jury room, he believed he had to vote guilty to protect his brothers because he was afraid they would be fired if he did not." Now, how did that statement come about? Was Mr. Fuller asked anything that brought about this answer or statement, or did he volunteer this information to you and Mr. Hall?

A. Well, actually, it was as if he weren't talking to anybody except Mr. Hall. This was just after he had looked searchingly into Mr. Hall's face, and had finally taken Mr. Hall's hand, and Jack had said to him that he didn't hold anything against him; all he wanted was to help him get well and everybody made mistakes and he was trying to do what he could to help him. And then Mr. Fuller gave this explanation to Mr. Hall as to why he had voted against him.

Q. Now, we skip one sentence and go down to the third sentence: "Mr. Fuller said that it wasn't right that they only looked at Government exhibits and not at the defendants' exhibits or case." How did that statement come into being? Was that elicited from Mr. Fuller or did he volunteer that

(Testimony of Harriet Bouslog Sawyer.)

statement? Or was a suggestion made to him that brought [371] forth this statement?

A. Well, this was a statement that his wife had said that he had made on many occasions before. On this occasion, the second time I was there, it is my recollection that after he made the first explanation to Mr. Hall, he just sort of sat there for a few minutes, and then he kind of shook his head and said it just wasn't right. It was a comment of —this one was a comment of his own. That was the thing he seemed to feel was—that he was so guilty and to blame about, because he hadn't insisted that they bring in—that they look at both sides of the exhibits.

Q. Well, you just said that Mr. Fuller said it just wasn't right. What was Mr. Fuller's complete statement?

A. That is the full statement, to the best of my recollection.

Q. That "it wasn't just right." Is that the complete statement?

A. No, he said it just wasn't right that they only looked at one side of the exhibits—or words to that effect. I didn't take down what he said in shorthand, Mr. Barlow, and these are just my——

Q. Well, when he said that it wasn't just right that they only looked at one side of the case, did he say "one side of the case"? Or what language did he use?

A. This is his approximate language, to the best of my recollection?

(Testimony of Harriet Bouslog Sawyer.)

Q. Which? [372]

A. The language that appears in the affidavit.

Q. So that the "one side of the case," he didn't say "one side." He said "the Government's side of the case," is that right?

A. The language in the affidavit was my best recollection, and this was dictated to my secretary very shortly after this conversation.

Q. Now, how did you get all the statements that are contained in this affidavit? Did you make notes at the Fuller residence while Fuller was talking?

A. Yes, I made notes.

Q. You were making notes? A. Yes.

Q. So that the affidavit that you presented to the Court was based upon notes that you took at Mr. Fuller's residence, is that right?

A. Well, I take the kind of abbreviated—I write one word or so, and then as long as I dictate within a day or so, that means something to me. Later it doesn't mean too much to me, but that was the way it was done, yes, Mr. Barlow.

Q. But you did use the words as alleged in the Affidavit—that he said it wasn't right that they only looked at Government exhibits and not the defendants' exhibits. So, did he say "government" or did he say "one side"? And did you conclude that it was "government" when he said that they only looked at one side? Was that your conclusion or was it his? [373]

Mr. Anthony: That has already been asked and answered several times.

(Testimony of Harriet Bouslog Sawyer.)

The Chairman: I think the question is proper.

The Witness: To the best of my recollection, the statement contained in the affidavit reflects in substance the meaning that Mr. Fuller conveyed to me, Mr. Barlow.

Mr. Barlow: Then you say he said it was a frame-up and said he blamed himself. Did you ask him whether it was a frame-up, or did he volunteer the fact that it was a frame-up and he blamed himself. How did this statement come into existence?

The Witness: That was his statement, and that —this first part, as I say, was directed specifically to Mr. Hall and seemed to be Mr. Fuller's spontaneous desire to explain to Mr. Hall why, knowing he was innocent, he had voted against him.

Q. But the affidavit is your affidavit, alleging, to the best of your recollection, what transpired on that date, is that right? A. Yes, that's right.

Q. And this statement that it was a frame-up, that he blamed himself, was a spontaneous statement by Fuller to Hall? A. That's right.

Q. Then you state that he said that they looked at Government exhibits, and any time someone suggested looking at [374] Defendants' exhibits, some juror would say, "later, later"—and they never got around to it. Now, did he volunteer that statement or was that statement a result of a question by either you or Mr. Hall?

A. That was a volunteer statement. Everything in that first paragraph was what Mr. Fuller said

(Testimony of Harriet Bouslog Sawyer.)

almost spontaneously to Mr. Hall when—after he shook hands with him and was trying to explain to him why he felt he had done Mr. Hall wrong and why he voted against him when he thought he was innocent.

Q. Now, during any part of this conversation that you allege in the first paragraph, did Mr. Fuller mention any of the other defendants involved in the case?

A. I don't believe he mentioned other defendants except Ariyoshi and Fujimoto. I don't remember his mentioning any of the others except Hall, Fujimoto and Ariyoshi.

Q. Well, he mentioned three names, is that right?

A. That's the only ones I can recall that he mentioned, although the substance of his conversation was that he felt the defendants were innocent.

Q. All the defendants?

A. All the defendants were innocent, and he felt guilty because he had put up no fight to assert their innocence.

Q. Then on paragraph two you state that he, Fuller—that is, that "he said that the jury in their deliberations decided that the communist party was a conspiracy within the first hour after they began their deliberations." Now, how did [375] that statement come into being?

A. That was elicited by a question.

Q. And who elicited the——

A. My recollection is that I asked Mr. Fuller

(Testimony of Harriet Bouslog Sawyer.)

what was the first thing that they did in the jury room.

Q. Then you say that "he said that the instructions of the Judge, which they used to decide this, was the one which told them first to decide whether there was a conspiracy, and they decided the Communist Party was a conspiracy." Now, was that a result of the question asked by you?

A. My recollection is that following the first thing—when he started to say that—when he said that the first thing they did was they decided right away the Communist Party was a conspiracy and they didn't have to look at anything else, but he said, "Then we sent for the instructions." And then I asked him which one of the instructions they referred to—and that was his answer.

Q. So you asked him the question which brought about the answer, is that right, Mrs. Bouslog?

A. Yes, I think it's a fair statement, yes.

Q. All right. And then you state that "he said he knew from what he heard the defendants were convicted before the case started on ideas the jurors had before the case started." Did that result from a question propounded by you?

A. No; that was Mr. Fuller, and I didn't know what he was talking about, frankly. I was—at the time, I didn't know to what he referred. Then it developed that he was [376] talking about when Judge Wiig was questioning the witnesses, that two of them, Nakamura and Abreu, had said that they had a very strong prejudice against commu-

(Testimony of Harriet Bouslog Sawyer.)

nism, and Judge had told them that communism wasn't on trial, and, therefore, that didn't make any difference. And that was what—maybe I didn't state it very artistically, but that was what Mr. Fuller said. But that was his own contribution. I didn't know—I was——

Q. And would you say that the next sentence included in that category, "He said he heard two jurors tell the Judge that they were opposed to communism," would you say that that was a complete thought? A. Yes, that was his.

Q. Then you state that, "He said that no secret ballots were taken, so everybody knew how each juror voted." Did you ask him whether any secret ballots were taken?

A. No, I think that was his—once he got started, he sort of went on with the continuity, although he wasn't a very talkative man, and it is my recollection that he said this following when he was talking about generally what went on in the jury room.

Q. So he volunteered the fact that no secret ballots were taken?

A. That was in the part of his explanation of why he hadn't put up a fight because—he explained that everybody else would know how he voted and so he was afraid that the other jurors would go out and tell how he voted. [377] If he voted for the defendants, that would—in that way the FBI and the Government and everybody would know how he voted.

(Testimony of Harriet Bouslog Sawyer.)

Q. Including the ILWU?

A. Everybody would know, yes. He thought it would become public knowledge because there were no secret ballots.

Q. Then you say that, "he said some of the jurors said the Government wouldn't bring the charge if it wasn't true." Did he volunteer that or was that elicited?

A. I can't recall at the moment how that particular thing came about. You see, this was more or less a conversation. One thing would lead to another—and it has been so long that actually the affidavit is my best recollection at the moment.

Q. And then the affidavit says, "He said that at some time he heard it said that if the defendants weren't convicted it would affect Hawaii's getting statehood." Was that a volunteered or an elicited statement?

A. I think Mr. Hall wanted to know something about what jurors discussed, other than the case. And that in the course of searching his memory, he would sit and think, and he mentioned this business of how—that a juror said we never would get statehood—or, one of the jurors said we never would get statehood if the defendants weren't convicted because of the big hullaboo about Communism.

Q. Then you say, "He said that the jurors on the side of [378] the Government said that anybody who was a member of the Communist Party must know what its purposes are and are guilty." Did he volunteer that or was that elicited?

(Testimony of Harriet Bouslog Sawyer.)

A. That was when he was—I think that was a statement which he was telling us about.

Q. Volunteered?

A. It was something that he mentioned in conversation, yes.

Q. Then you state that "he said that the jury wanted Kawano's testimony. He said the jurors on the defense side asked for Kawano's testimony to show that none of the defendants ever talked about overthrowing or destroying the Government." Was that volunteered by Fuller or was that asked for?

A. He told us that just before the verdict of guilt was returned, there were five votes for acquittal of Jack Hall—about a half an hour before that. And he said that those five people kept wanting the Kawano testimony, and then when the others kept getting angry, why, the ones who were on the defendants' side just threw in the sponge.

Q. Would you put that in the category of a volunteered statement?

A. Yes. I think that would be clearly—my recollection is that it was—what—when he was saying what happened in the jury room. Generally, at the beginning, Mr. Barlow, we asked him to recollect as much as he could of what happened in the jury room, and these were his—so in a certain [379] sense, he was telling us his recollections of what happened in response to a general over-all question. Then when he mentioned one thing, we didn't understand his reference, then we would ask a question to clarify in our own minds what he meant.

(Testimony of Harriet Bouslog Sawyer.)

Mr. Peters: You remember asking Mr. Fuller, then, to tell all that he could remember that occurred in the jury room?

The Witness: That's right. I was trying to find out if there had been any misconduct in the jury room.

Mr. Peters: Did Mr. Hall propound the same question to him or were you conducting the examination at that time?

The Witness: It was really a conversation, and I would say that we first let Mr. Fuller say everything he wanted to say; and then, apparently, he didn't know what it was he could do to help Mr. Hall. He was—his attitude was he had done Mr. Hall a wrong and now he wanted to do anything he could to help. And we explained to him that we were going to put this in an affidavit and give it to the Judge. And so he was trying to tell us as much as he could remember about it and—you see, he wanted to go to the Judge in the first place. We were trying to get him to tell us as much as he could remember.

Q. You say, Mrs. Bouslog, that he wanted to go to the Judge in the first place. Is that right? [380]

A. He wanted to go to the Judge—his wife had told me that. That was as far as I was concerned. But he told us himself that he had wanted to go to the Judge, and so we said, "Well, we will put it in an affidavit and give it to the Judge."

Q. When Fuller said that he wanted to go to the Judge, did you indicate to Mr. Fuller that you

(Testimony of Harriet Bouslog Sawyer.)

would get in touch with Judge Wiig and inform him of what went on?

A. Oh, yes, this was—you see, we expected to have a hearing in which Mr. Fuller would appear before Judge Wiig, and so this was merely to make out a prima facie case to entitle us to a hearing. I expected on July 2nd, when we went into Court, that these affidavits were merely—enough to make out a prima facie case. And we had our witnesses there and ready to proceed before Judge Wiig. Mrs. Fuller was there and Oshiro was there.

Q. Now, when you went to see Mr. Fuller, you find him in a weakened condition. And first you find out from Mrs. Fuller that Mr. Fuller wanted to see Judge Wiig. And then you indicate now that you understood that Mr. Fuller did want to see Judge Wiig, and that you indicated to Mr. Fuller that you would put everything into an affidavit form.

A. No, I beg your pardon. I didn't indicate that I would put Mr. Fuller—my recollection has clarified now. I was hopeful that Mr. Fuller himself would be able to go into Court, and I don't think the discussion of affidavits came until a couple of days later. [381]

Q. You felt Mr. Fuller would be able to be in Court at the hearing? A. I hoped so.

Q. You just indicated that at the hearing, you had Mrs. Fuller there, Mrs. Oshiro there. Was Mr. Fuller there the day you had the hearing or anticipated hearing?

(Testimony of Harriet Bouslog Sawyer.)

A. I didn't say I had Mrs. Fuller there. I had Mrs. Cabreros there, Mrs. Ellen Fuller Cabreros. And Mrs. Oshiro—and I had myself and Mr. Hall. And I had expected to ask Judge Wiig either to convene—postpone the hearing until Mr. Fuller was able to appear or to—and I thought that would be——

Q. You say you anticipated asking Judge Wiig to postpone the hearing until Mr. Fuller was able to appear. What gave you the idea Mr. Fuller wasn't able to appear on that day?

A. We had plenty of witnesses to take care of that one day already, and I wasn't anticipating what—I didn't—you are asking for hindsight. I don't know.

Q. Now, I am asking you—you said that you were going to ask Judge Wiig to postpone the hearing until Mr. Fuller was able to appear. Now, what did you mean when you made that statement?

A. Well, that was my intention.

Mr. Anthony: Just a minute. That is a misstatement of the witness' answer. She didn't say anything about postponing it. [382]

Mr. Barlow: Continuing or postponing it—regardless of what the word is.

The Witness: When I appeared in Court on July 2nd, 1953, at the time scheduled for the hearing on this motion for a new trial, at that time, and that is about four days or more than four days—this was the 27th—the 27th of June—when I appeared in Court on July 2nd, at the time scheduled

(Testimony of Harriet Bouslog Sawyer.)

for the hearing on the motion for the new trial—at that time, I had my witnesses present, ready to proceed with the actual hearing on the motion for a new trial. At that time, I didn't have Mr. Fuller present because I had ample witnesses to take care of the entire 2nd; and I had had intended to proceed with other witnesses. At that time, I didn't know what Mr. Fuller's condition was because—on the 2nd, because I hadn't seen him since, I believe, the 29th.

Q. You say you saw him last on the 29th?

A. Yes.

Q. Did you at any time prepare an affidavit for Mr. Fuller's signature?

A. For Mr. Fuller's signature?

Q. Yes. A. No, I did not.

Q. Did you at any time ask Mr. Fuller whether he would sign an affidavit? A. No, I did not.

Q. Why?

A. Because I laid the facts as an officer of the Court [383] and under oath before Judge Wiig, and I expected—I felt that Mr. Fuller was ill and I wanted to lay the full facts before the Judge. I thought the objective conduct which he had manifested after the verdict by other members of his family was the thing in which the Court would be most interested because that, I thought, entitled me to a new trial.

Q. You say in substance that—at least in substance you said that you felt he was ill. Do you feel that he was too ill to sign an affidavit?

(Testimony of Harriet Bouslog Sawyer.)

A. I didn't feel that I knew whether he was able to sign an affidavit. So I chose the course of laying the full facts before Judge Wiig in my affidavit and letting that be decided at a later time.

Q. Did you feel as an attorney it would be more advantageous to have an affidavit from the person involved rather than have it second-hand or hearsay?

A. Well, to this extent, I thought it would be more advantageous to have an affidavit of Mrs. Fuller as to what Mr. Fuller's conduct had been, and I tried to get such an affidavit.

Q. And did Mrs. Fuller sign such an affidavit for you? A. No, she did not.

Q. Why did she not sign it?

A. I don't know what she didn't sign it, but I know what she said.

Q. What did she say? [384]

A. I prepared—she said—it was in the parlor of the Fuller home—I believe it was on the 29th of July—and I went alone and I had a draft of an affidavit which I had dictated to my secretary, containing everything that Mrs. Fuller had told me, primarily on the first occasion that I went, on June the 26th—about her husband's conduct between July 19th, the time the verdict was returned, and—June 19th, the time the verdict was returned—and June 26th, the time I talked—I put this in the affidavit. And she said—and I asked her to sign it, and Mr. Fuller was present and I went over sentence by sentence of the affidavit with her, and she made

(Testimony of Harriet Bouslog Sawyer.)

several changes, and suggested that certain things weren't quite as they had happened. I made those changes on the paper that I had, and then I asked her to sign it and she said no—that Mr. Fuller had gotten himself into a mess and he had to get himself out of it; that she wasn't going to do anything; and Mr. Fuller kept asking her to sign the paper, and she refused.

Q. When Mr. Fuller kept asking Mrs. Fuller to sign the affidavit, why didn't you then ask Mr. Fuller that if he was so anxious for Mrs. Fuller to sign, to sign one himself.

A. I have explained that I preferred to lay the matter before the Court based upon the affidavits that I filed. Maybe it was an error in judgment, but it was my judgment at the time that I followed—it seemed to me that I had enough in the affidavits that I filed to make out a prima facie case entitling me to a full hearing in which the [385] Judge himself would hear all the witnesses.

Q. Well, when you knew Mr. Fuller was anxious to see the Judge, why didn't you as an officer of the Court get in touch with Judge Wiig?

Mr. Anthony: We have been all through this before, Mr. Chairman.

The Witness: I considered it getting in touch with the Judge when you file an affidavit.

Q. (By Mr. Barlow): That is your answer?

The Witness: Yes. I did it to inform the Judge fully of everything I knew.

Q. And you filed the affidavit approximately six

(Testimony of Harriet Bouslog Sawyer.)

or seven days after you interrogated Mr. Fuller, is that right?

A. The affidavit was filed——

Q. Whatever length of time expired—whatever the record shows.

A. The affidavit was filed on July 1st.

Q. And you felt your means of communication with the Judge was through this affidavit filed in the District Court, is that right?

A. I felt I was fulfilling my responsibility to my client and to Mr. Fuller by proceeding to file a motion for a new trial based upon the information which I had.

Q. Did Mrs. Fuller indicate to you that the reason that she didn't want to sign the affidavit was that the facts that were contained in the affidavit were not true? [386]

A. No, she did not. She made some corrections, and otherwise she said the facts were—grudgingly, she said the facts were as they were. She was rather antagonistic on the third occasion—to me.

Q. Did Mrs. Fuller at any time while you were talking to her about the affidavit indicate to you that you know that Mr. Fuller wasn't in his right senses or mind and that he didn't know what he was talking about?

A. I don't recall Mrs. Fuller saying exactly that, but there isn't any question that the general sense or burden of her conversation was that there had been occasions when her husband had been

(Testimony of Harriet Bouslog Sawyer.)

out of his head. There is no question about that in my mind.

Q. So that when you were talking about an affidavit and the contents of the affidavit, Mrs. Fuller had informed you to the effect that there were times when Mr. Fuller, as you say, was out of his head. Is that right?

A. I say I don't recall whether she said that in so many words, but the things that she related to me indicated that she felt that he had been at the time when the particular occurrences about which she told me occurred.

Q. That was the impression she conveyed to you? A. Yes.

Q. And you got that impression?

A. Yes. But she didn't convey to me the impression that he had been irrational all of the time or even a majority of the time. And that was my own feeling. I didn't know—I wasn't [387] able to make a judgment. I thought that many times that he was so completely rational, and yet on other occasions, I felt that he had been so ill, and from what his wife told me, I preferred not to——

Q. In the affidavit you presented to the Court, as an officer of the Court, as you testified, did you indicate to Judge Wiig just what you testified to now? That Mrs. Fuller had indicated to you that Mr. Fuller on several occasions was very irrational? Or did you merely confine your affidavit to the word "sick"?

(Testimony of Harriet Bouslog Sawyer.)

A. I can't understand the question. I don't understand the question. It isn't clear to me.

Q. I will withdraw the question. You just testified that Mrs. Fuller conveyed the impression to you that Mr. Fuller on occasions appeared irrational. Am I right up to that point?

A. Yes.

Q. Did you at any place in your affidavit indicate to the Court—that's Judge Wiig——

Mr. Anthony: The affidavit speaks for itself. We can all read the affidavit.

Mr. Barlow: Did you at any time indicate to——

The Chairman: I think the question is proper.

Mr. Anthony: Mr. Chairman, what he is asking here is to the contents of a written instrument which is before the Committee. The written instrument speaks for itself. A perfectly well established rule of evidence. [388]

The Chairman: Well, she has it before her, Mr. Anthony. If she can't remember it, she can refresh her memory. That is also well within the rules of evidence. If you don't know, Mrs. Bouslog, you can of course refer to the affidavit.

Mr. Barlow: Did you at any time in affidavit form or otherwise indicate to the Court that Mrs. Fuller had told you that upon occasions after the verdict Mr. Fuller appeared irrational?

The Witness: That is a misstatement. Mrs. Fuller never told me that Mr. Fuller appeared to her irrational. I said in my own mind I drew the conclusion from the objective conduct of Mr. Full-

(Testimony of Harriet Bouslog Sawyer.)

er's, which she related, that he must have been delirious or out of his mind at that time, and in my affidavit, I set forth the objective conduct which Mrs. Fuller had said, had attributed to her husband, and I assumed that Judge Wiig or other persons would, from my affidavit, draw the conclusion that I didn't know whether or not Mr. Fuller was himself capable of making an affidavit. Because honestly, I didn't know.

Q. Did you at any time inform Judge Wiig in any maner, either oral or written, that you had gotten the impression of Mr. Fuller from the objective acts you refer to seemed to you to be irrational?

A. I considered that my affidavit fully set forth all the facts—everything that happened at the Fuller house in full and complete substance. And that was my intention in making [389] an affidavit.

Q. Now, you say the first day you got there, you yourself indicated that you didn't feel he was in a condition to talk, is that right?

A. I didn't feel that he was in a physical condition to talk. He seemed to have about lost his voice—so, I would say that that is correct—with the qualification of physical, because I didn't know anything about his mental state at that time.

Q. Now, Mrs. Bouslog, before Judge Wiig—I will withdraw that. What were your duties throughout the trial? Were you present on each and every day throughout the trial?

(Testimony of Harriet Bouslog Sawyer.)

Mr. Anthony: I object to that. That is immaterial.

The Chairman: What bearing does that have on this matter, Mr. Barlow?

Mr. Barlow: Well, the defendant has filed a statement by Judge Wiig, attributed to Judge Wiig, thanking and complimenting the people at the trial or their attorneys for their behavior and demeanor, and I wanted to find out from Mrs. Bouslog whether she was present each and every day, and let the Committee decide whether the statement that they introduced as referring to Mrs. Bouslog's conduct and attitude really referred to her conduct and attitude.

Mr. Dodge: How could we tell that from her testimony? [390]

Mr. Barlow: Well, very simply. The Judge says, "I want to thank all you lawyers for your demeanor in Court." Then we find out from this attorney that—let's assume for the purposes of argument she was never in Court. So I would assume that as a reasonable man the Judge wasn't talking about her behavior.

Mr. Anthony: All a matter of argument.

Mr. Barlow: Well, they are asking me why and I am telling them how I feel about it.

Mr. Anthony: You are arguing the case.

Mr. Barlow: I have a right to answer them if they ask me.

The Chairman: Any comment from the Committee on the admissibility?

(Testimony of Harriet Bouslog Sawyer.)

(No response.)

The Chairman: We will permit the question. Will you read it, please?

(Question read by the reporter.)

The Witness: I was not present on each and every day during the trial.

Mr. Barlow: Isn't it true that most of your duties throughout the trial was research in your own office; that the actual conduct of the trial was by Mr. Symonds, Gladstein and Wirin?

The Witness: That is not true, no. I participated with other counsel in the separate—I will say I did [391] have a great responsibility with respect to the legal work and the preparation of papers and the argument of motions and the preparation of briefs and looking up points of law for the other lawyers. That was my responsibility. And that was the reason why I was not always in Court, because sometimes it wasn't possible to do that and be in Court at the same time.

Q. Mrs. Bouslog, on July 2nd, Judge Wiig did query you about Juror Fuller in the affidavit that you filed, is that true?

Mr. Anthony: I didn't hear that.

(Read by the reporter.)

The Witness: No, it is not true. Judge Wiig asked me whether I had spoken to any other juror except Juror Fuller, to which I replied no, and to

(Testimony of Harriet Bouslog Sawyer.)

the best of my recollection, that was the only thing that Wiig said about Juror Fuller—other than saying that the motion was denied.

Mr. Barlow: By that answer, didn't you indicate to the Judge that you had spoken to Mr. Fuller?

The Witness: Oh, yes. I had filed an affidavit.

Mr. Anthony: Just a minute. The affidavit is on file.

Mr. Barlow: And did Judge Wiig interrogate Mr. Gladstein as to whether he had spoken to some jurors?

Mr. Anthony: I object to that as all covered at great length yesterday and has no revelance to anything in this proceeding. [392]

Mr. Barlow: It wasn't covered.

The Chairman: Well, we closed with that line of testimony last time, Mr. Barlow, and the testimony at that time was that—well——

Mr. Barlow: We didn't finish it. May I suggest to the Chairman that the way it was left I was supposed to get a copy of the transcript. I spoke to Mr. Grain, and Mr. Grain said it was physically impossible to get a copy of the transcript until next week. That's the way I remember we left that.

Mr. Anthony: What has that to do with the present question. The answer is nothing. The way the record was left, Mr. Barlow was to produce an extract from the transcript, and I would object to it on the ground it was not relevant. At that point the Chairman of the Committee excluded interrogation

(Testimony of Harriet Bouslog Sawyer.)

of the witness on the subject of Gladstein, Gladstein not being on trial—clearly not relevant.

Mr. Barlow: May I indicate to the Chairman the purpose of the question?

The Chairman: Very well.

Mr. Barlow: The defendant has filed a transcript of Judge Wiig's remarks wherein Judge Wiig commended and complimented the counsel for their demeanor and attitude, and I want to show by this line of questioning that Judge Wiig took rather a dim view of the interrogation of jurors and indicated to Mrs. Bouslog and Mr. Gladstein his feeling and attitude. [393]

The Chairman: Well, my recollection, Mr. Barlow, when we discussed this the other day was that you were going to get a transcript, whether you could produce it today or otherwise, and that was going to embody Judge Wiig's comments.

Mr. Barlow: That's right. I want to lay the foundation for it and ask the young lady——

The Chairman: As I recall, Mr. Anthony said he had no objection to the presentation of such an abstract.

Mr. Anthony: Subject to the materiality.

The Chairman: That's right.

Mr. Barlow: Well, I might suggest to the Chairman that I know Mr. Anthony has a copy of it. I don't have a copy.

Mr. Anthony: I will lend you my copy if it will expedite this thing. We have wasted fifteen minutes on a question the Committee has already ruled on.

(Testimony of Harriet Bouslog Sawyer.)

Can't you conclude the examination of the witness. I'll furnish the transcript to Mr. Barlow. If he has any other questions, he ought to ask them.

Mr. Barlow: Can we have a ruling from the Chair—whether the Chair is going to allow that colloquy between counsel in evidence?

The Chairman: I don't see that I can very well rule at this moment. We don't know what the colloquy says. We don't know whether it is material. [394]

Mr. Barlow: Well, I will read it to the Chairman, and then I can have a transcript made.

Mr. Dodge: Is this only for the purpose of qualifying what appears to be a statement by Judge Wiig contained in the transcript that is in evidence?

Mr. Barlow: That is the only reason—to show that Judge Wiig took a dim view of the behavior pattern of the defense counsel in interviewing witnesses. That is the only reason. No other purpose.

Mr. Peters: Why shouldn't it go in and stop all this talking?

Mr. Anthony: I will let it go in. Let's have an end to all this nonsense. It has nothing to do with the case.

The Chairman: It seems to me no more, actually, Mr. Anthony, than an authority which he might take off the wall of some other case.

Mr. Anthony: Correct.

The Chairman: It was the Judge's indication——

(Testimony of Harriet Bouslog Sawyer.)

Mr. Anthony: Correct.

The Chairman: ——of what he thought the law was.

Mr. Anthony: And I might add, by the same specious argument, that the Judge has reversed himself when he said directing his remarks to all counsel: "I do want the record to show that I thank you all for your assistance, your conduct and your demeanor throughout the trial." And I agree that it goes in and we can get on with the case. [395]

The Chairman: Very well.

Mr. Barlow: It's in? And there's no question about it. Right?

The Chairman: Very well, it will be admitted.

Mr. Barlow: Mr. Anthony read that statement to the Chairman of the Committee and I want to call the Chairman's attention to the fact that Judge Wiig made that statement to counsel——

Mr. Anthony: I am going to withdraw my agreement if we are going to have any more wrangling about this thing.

The Chairman: What argument——

Mr. Barlow: All right. I will withdraw everything I said in that last remark that I attempted to make. The evidence will speak for itself.

The Chairman: Well, I think for the purposes of the record we ought to get an exhibit number on it.

Mr. Barlow: May I borrow that, Mr. Anthony, and replace it?

(Testimony of Harriet Bouslog Sawyer.)

Mr. Anthony: Will you indicate to me what you want?

Mr. Barlow: The July 2nd proceedings.

Mr. Anthony: The whole proceedings?

Mr. Barlow: That's right.

Mr. Anthony: Well, I object to that. I don't agree with that at all.

Mr. Barlow: Well, what did you agree to? [396]

Mr. Anthony: Just simply that he was interrogating Mrs. Bouslog.

Mr. Barlow: Well, you see I have to finish my argument to the Committee, if he doesn't want to stipulate to that.

Mr. Anthony: All I am trying to do is to get through this silly wrangle, in my opinion. If he wants to prove that Judge Wiig on this day took "a dim view" of talking to jurors, I will stipulate that Judge Wiig did so.

Mr. Barlow: That's all I want.

Mr. Anthony: All right. Let's get on with the case.

The Chairman: Very well. It is so stipulated.

Mr. Barlow: Now, Mrs. Bouslog——

Mr. Peters: I don't know about this. How far is your stipulation binding on me—that Judge Wiig took "a dim view"?

Mr. Anthony: It isn't binding at all.

Mr. Peters: Then what is the use of it.

Mr. Anthony: All I am trying to do is to cut off a prolonged wrangle over an irrelevant matter.

Mr. Dodge: I am confused because a moment

(Testimony of Harriet Bouslog Sawyer.)

ago Mr. Barlow tried to show that Judge Wiig's comment about the demeanor of attorneys had no reference to this Licensee because she wasn't there. Now we are being asked to take other remarks of Judge Wiig as taking a dim view of talking to jurors as applicable to her. I am confused. [397]

Mr. Barlow: Well, you shouldn't be because the testimony that you have heard alluded to now is stricken.

Mr. Peters: Supposing Judge Wiig had complimented Mrs. Bouslog in the enthusiasm of getting this affidavit. Has that got anything to do with us? Do we take our law in the case from Judge Wiig?

Mr. Anthony: That is my whole point. It is irrelevant.

Mr. Barlow: Well, if it is irrelevant, why did the Committee——

Mr. Peters: I don't know that it is relevant. You are entitled to argue it. If that is what the record shows to you, why you are entitled to argue it.

Mr. Barlow: But the Committee has already accepted a statement of Judge Wiig, attributed to Judge Wiig, wherein he indicated that he thought that the behavior of the counsel for defendants was superb. Now, certainly if that testimony is in the record——

Mr. Peters: Did you object to that?

Mr. Barlow: I didn't object to it, no, sir.

Mr. Peters: Well, then, what are you talking about? It was admitted without objection.

Mr. Barlow: That's right——

(Testimony of Harriet Bouslog Sawyer.)

Mr. Peters: As to its value, the Committee will determine that.

Mr. Barlow: But now that it's in evidence before the Committee, I have a right to show that that doesn't truly [398] represent Judge Wiig's feeling.

Mr. Peters: Well, supposing we are not interested in Judge Wiig's feelings, then what?

Mr. Barlow: Why did the Committee accept that evidence then?

Mr. Peters: It was offered and came in without objection.

Mr. Barlow: I have a right—the state of the evidence right at this moment is that Judge Wiig has complimented the counsel for defendants, am I right? That is the state of the evidence. I have a right to show that Judge Wiig, in fact, did not compliment the defendants' behavior.

Mr. Dodge: May I ask a question—did Judge Wiig ever refer these matters—either of these two matters to the Bar Association?

Mr. Barlow: The testimony will be adduced at this hearing along those lines.

Mr. Anthony: I wish we would get along with some testimony instead of some irrelevant wrangling.

The Chairman: May I ask one other question? Mr. Barlow, is there a portion of the July 2nd transcript which could be submitted to this Committee which gives Judge Wiig's remarks, for whatever

(Testimony of Harriet Bouslog Sawyer.)

they were worth, so that we may proceed without putting the whole transcript in?

Mr. Anthony: I have already made that agreement [399] subject to my argument as a lawyer that it is irrelevant. Obviously this Committee isn't bound by what Wiig says.

The Chairman: My feeling is to go ahead with the hearing and the Committee will accept it if you will file it with the Committee as an exhibit for whatever it is worth.

Mr. Barlow: Sure, that's all I want to do. The Committee can ignore Judge Wiig. I don't care what the Committee does, but I think the Committee——

Mr. Anthony: Can't we get along with the hearing?

Mr. Barlow: Mrs. Bouslog, during the pendency of the Smith Act trial, did you make other speeches——

Mr. Anthony: I object to that as irrelevant.

Mr. Barlow: ——or factual reports to your constituents or committees—or factual reports of meetings of ILWU workers?

Mr. Anthony: I object to it on the ground it is irrelevant to anything in this proceeding. Already been ruled on.

Mr. Barlow: It wasn't ruled on in connection with——

Mr. Anthony: I will take the ruling of the Chair without argument.

(Testimony of Harriet Bouslog Sawyer.)

The Chairman: Any comments of the Committee?

Mr. Peters: I think if you make this witness your witness and lay a foundation, why, we can consider it now. If you want to make it part of your rebuttal case—— [400]

The Chairman: I think that was the previous ruling, Mr. Barlow, that if it was part of your rebuttal, we will consider it. But right now, she has taken the stand in her own defense.

Mr. Barlow: Well, she is under cross-examination now, is that right?

The Chairman: That is correct.

Mr. Barlow: Don't I have the right? She has already indicated to this Committee that the statements that are attributed to her were taken out of context. Am I right?

Mr. Anthony: I object to Mr. Barlow interrogating the Committee. The Committee isn't on trial. I would like to argue what the testimony is without any snap response from the Committee.

Mr. Barlow: I respectfully refer the Committee to the evidence that is introduced as to the colloquy between Judge Wiig and Mrs. Bouslog where she said in the statement that is right now in evidence before the Committee that the statements attributed to her were taken out of context.

The Chairman: You mean Exhibit "D"?

Mr. Barlow: Yes, sir. Now, I have a right under cross-examination to ask the witness whether she has made other speeches, and then I will make her

(Testimony of Harriet Bouslog Sawyer.)

my own witness and introduce these documents in evidence. But all I am asking her now—she has said to the Committee—— [401]

Mr. Anthony: Mr. Chairman, can't we get on with the case?

Mr. Barlow: "——these statements are out of context; these statements are out of context." Now, I have a right to ask her if she has made other speeches and to show this Committee the pattern of the other speeches.

Mr. Anthony: Is there anything before the Committee? Do we have to listen to all this argument?

The Chairman: We have a question—I think the question—maybe the—would you read the question?

(Question read by the reporter.)

The Witness: Yes, I made speeches during the pendency of the Smith Act trial—I guess the pendency—I don't know what the pendency is, but I have from time to time been asked to speak and I have on occasions spoken at the meetings of ILWU workers.

Mr. Barlow: I show you a pamphlet entitled "Fear" and ask you to look at that and examine it closely.

Mr. Dodge: I take it these questions are now for the purpose of testing whether or not she said what she is attributed to have said at Honokaa.

Mr. Barlow: That's right.

(Testimony of Harriet Bouslog Sawyer.)

The Witness: I am familiar with this pamphlet, Mr. Barlow.

Mr. Barlow: Is the speech as reported in that pamphlet that is attributed to you, is that speech correctly reported? [402]

The Witness: Yes, I believe that it is correctly reported. This was not an extemporaneous speech.

Mr. Barlow: It was a prepared speech made by you?

The Witness: Yes.

Q. (By Mr. Barlow): Now, for the sole purpose of introducing this into evidence, I would like to make Mrs. Bouslog my own witness—just for this one purpose.

Mr. Anthony: Are you finished with the witness otherwise in this?

Mr. Barlow: No.

Mr. Anthony: Why don't you identify——

Mr. Barlow: It is already in identification. If you want me to finish with her, and then make her my own witness, fine. Talk about saving time.

The Chairman: Well, I think we should, but at the moment I think the reporter should have a recess. We have been going for an hour. We will take a short recess.

(Recess.)

The Chairman: Shall we proceed with our hearing?

Mr. Barlow: Mrs. Bouslog, you stated that you did make other speeches along the same lines?

(Testimony of Harriet Bouslog Sawyer.)

The Witness: I said I made other speeches to the ILWU during the course of the Smith Act trial.

Q. And what was the nature of the speeches?

A. I spoke on whatever subject I was asked to speak on—or one—that one speech that you showed me a moment ago, why, [403] I was invited as a Labor Day speaker for the Island of Kauai, and that was made as a Labor Day speech.

Q. With reference to the Smith Act trials throughout the country? A. Yes.

Q. And the Smith Act trial in Honolulu was then in progress, is that right? By progress, I mean that the indictment had been returned.

A. It was two days after the indictment had been returned that the speech was made. The trial didn't start for two years after that.

Q. But it was within a period after the indictment was returned?

A. Two days, I believe. It was the 31st of August, I believe, when the indictment was returned. This was Labor Day, September.

Q. Now, on June 7, 1952, in a rally for the support of Hawaii victims of Smith and McCarran Acts persecution, held at Lahaina, Maui——

A. What was that?

A. At a rally in support of Hawaii victims of Smith and McCarran Act persecutions held at Lahaina, Maui, did you make the following statement that is attributed to you: "The Smith Act is the king-pin in a plot against the people. The whole plot of war, of back-breaking taxes, of lower living

(Testimony of Harriet Bouslog Sawyer.)

standards, of anti-labor legislation, of deportation of aliens, of destruction of free speech and assembly—this [404] plot will fail if the people of America and Hawaii show that their love of peace, democracy and freedom is greater than their fear of Communism. If we win the battle of public opinion before the Smith Act trial, twelve men on the jury will not vote to convict Jack Hall and the other six defendants." Did you say——

Mr. Anthony: Just a minute, Mrs. Bouslog. Mr. Barlow is not being very fair. He is reading from something—whether it's an FBI report or what it is, I don't know, but I think the document should be shown to the witness.

Mr. Barlow: It's a report to me by the attorney—not to me, I'm sorry. I withdraw that. It's a report to Edward N. Sylva, Attorney General, Subject: Hawaii Smith Act case; re: Professional Conduct; dated November 3, 1953, at Page 3, starting the third, fourth and fifth paragraphs.

Mr. Anthony: Hand the witness the document and let her look at it.

Mr. Barlow: Well, I want to identify it.

The Witness: Which paragraph—I wasn't—which one did you want me to look at—where did you read?

Mr. Barlow: I read from here. These two paragraphs.

The Witness: This sounds like statements I very well might have made. I have no recollection of the exact words, but certainly I have on many occa-

(Testimony of Harriet Bouslog Sawyer.)

sions expressed my belief that both the Smith and McCarran Acts are bad laws and conflict [405] with constitutional principles and that they should be repealed; and that they are the instruments of reaction. And I have expressed that not only once, but many, many times.

Mr. Peters: Had the jury been sworn to try the case at that time?

Mr. Barlow: No, your Honor. The trial started sometime in November, 1952, did it not? This is prior to the trial but subsequent to the date of the indictment.

Mr. Cades: What was the date of the speech?

Mr. Barlow: This date is June 7th, 1952. During the Smith Act trial, you did make other speeches about the Smith Act, is that right? By Smith Act trial, I am referring to subsequent to the date of the indictment, you did make several speeches in the Territory of Hawaii about the Smith Act, is that right?

The Witness: Between August, 1951, and today, I have made several speeches—how many or how many occasions, I have no present recollection, and I'm sure that in many of them, I mentioned both the Smith and the McCarran Acts, and probably several other laws that I don't particularly——

Q. You heard Mr. Hall testify?

A. Yes, I heard Mr. Hall testify.

Q. And you heard Mr. Hall say that since the Honokaa speech they kept you quiet or under wrap, so to speak?

(Testimony of Harriet Bouslog Sawyer.)

A. Well, I didn't get that impression from it. I thought he was making a joke, Mr. Barlow.

Q. Well, it's recorded in the testimony as rather serious. [406] Did you or did you not make any speeches subsequent to the Honokaa speech?

A. I have made Labor Day speeches, I believe, every Labor Day since I have been in the Territory, and there have been a couple of Labor Days. And I have spoken to other Union meetings on many occasions.

Q. Did you speak this past Labor Day?

A. Yes, I did.

Q. Will you tell us what your speech was all about?

A. I'm afraid my recollection is rather hazy as to the speech I made this last Labor Day. It was made on Kauai.

Mr. Barlow: I have no further questions. Now, can I make her my own witness?

The Chairman: Very well.

Direct Examination

By Mr. Barlow:

Mr. Barlow: You have already identified that as a speech you made, is that right?

The Witness: I am familiar with that pamphlet.

Mr. Barlow: I introduce that in evidence.

Mr. Anthony: We object to it on the ground it isn't relevant. May I have the purpose stated. I will withdraw my objection until I hear the purpose.

(Testimony of Harriet Bouslog Sawyer.)

Mr. Barlow: The purpose is to question the credibility and the additional collateral purpose of a pattern. [407]

Mr. Anthony: I object to that on the ground we are not trying any pattern of conduct here.

The Chairman: I think the Committee has ruled that they will accept it. It is accepted and it will be marked Exhibit No. 6.

Mr. Anthony: That is for the purpose of testing the witness' credibility, Mr. Chairman? Mr. Barlow added a rather inarticulate phrase "to show a pattern." He didn't say a pattern of what. So I'm asking just——

The Chairman: The Committee, at least more than a majority of the Committee are willing to admit it for that purpose. It seems to me, Mr. Anthony, it's in evidence. The Committee can consider it, and—I don't know—I haven't read the pamphlet.

Mr. Anthony: I haven't read it either.

Mr. Symonds: I think the record should show for what purpose it is being admitted. I think it is only fair to us. It's a long speech. We should know when we start writing briefs what we are writing about.

Mr. Anthony: The point is I want to know if I have to read the thing. If the rule is that it is admitted to test her credibility, I'm——

The Chairman: Perhaps you could restate your second ground, Mr. Barlow, so that the Committee could also rule on that. It is admitted for the

(Testimony of Harriet Bouslog Sawyer.)

purpose of credibility. Now, what was your second purpose? [408]

Mr. Barlow: My—it was a collateral purpose, because once it is in, it's in. By a collateral purpose, I call the attention of the Committee to the fact that it is a speech. It is consistent with a speech attributed to her at Honokaa.

Mr. Dodge: It seems to me the Committee has already ruled it is not admissible for the second purpose. If it is offered for that purpose alone, it seems to me under the Committee ruling before, it would be inadmissible. However, I think the Committee has also stated, and this is my personal opinion of what the Committee has already done so far—inadmissible to test credibility.

Mr. Barlow: Well, all I am doing is stating the purpose. The Committee makes the ruling. The Committee has admitted it for a limited purpose—for the credibility. And there it is. I'm not going to argue the point.

Redirect Examination

By Mr. Anthony:

Q. Mrs. Bouslog, was Mrs. Fuller in the United States District Court at the time you presented your motion for a new trial?

A. I don't know whether she was. I did not have her there as a witness, but I intended to subpoena her later during the hearing.

Q. I believe you used the expression inadvert-

(Testimony of Harriet Bouslog Sawyer.)

ently here several times that Mrs. Fuller was present. You were referring [409] to Ellen Fuller.

A. Ellen Fuller Cabreros. It was an error.

Q. Under the rules of criminal procedure, there is a fixed time within which a defendant must file his motion for new trial, is that not correct?

A. That is correct.

Q. Do you recall what that period is—is it ten days?

A. It is ten days under the Federal rules, and for this supplementary motion, I had applied to and gotten from Judge Wiig a five-day extension, so that I was working under pressure of time in getting the affidavit——

Q. You mean to say that a Federal judge can extend the time for the filing of a motion?

A. If you apply within——

Q. Within the ten days?

A. Within the ten days period. I had already filed a motion for a new trial on numerous other grounds, and this is entitled Supplemental Ground for a New Trial.

Q. Were you present in the court room when the verdict was returned? A. I was.

Q. And the remarks that are addressed to counsel, you were there at that time? A. I was.

Mr. Anthony: That's all.

The Chairman: Any questions?

Mr. Dodge: I have some. [410]

Examination by Mr. Dodge:

Q. At the time you talked to Mr. Fuller, do you

(Testimony of Harriet Bouslog Sawyer.)

know whether the jury had been excused or not—the jury had been discharged? A. Oh, yes.

Q. Were they discharged immediately following the verdict?

A. They were discharged immediately following the verdict on June 19th, 1953. And this was Saturday, a week following. That would be eight days later.

Q. I have a couple of other questions on this Honokaa thing. You stated, I think on Monday, that you did not criticize Judge Wiig's ruling as such in the speech that you made, but rather that you left that conclusion to the audience.

A. Yes.

Q. And in view of that and in view of the audience you were talking to, was there any doubt in your mind as to what conclusions that audience would draw from your remark?

Mr. Barlow: I object to the question as a Committee member, if I have the right to object to the question. I think it is entirely irrelevant and assuming——

The Chairman: Oh, I think the Committee is entitled to pursue this.

Mr. Peters: Just sit back again and appreciate what Mr. Dodge is asking, Mr. Barlow. He's asking Mrs. Bouslog whether or not the camouflage relative to generality was calculated to be applied specifically to Brother Wiig. [411] That's all he is asking. Do I understand your question?

(Testimony of Harriet Bouslog Sawyer.)

Mr. Anthony: That is a question the Prosecution ought to ask.

The Chairman: I think the question is proper.

Mr. Dodge: I expected an objection to that, but not from you.

Mr. Anthony: I will say to the Committee right now—I have read these speeches and I would agree with the conclusion implicit in Mr. Dodge's question; namely that this was a talk about what was going on in the Smith Act trial here in Honolulu. Now, let's not fool ourselves about that. We're lawyers here.

The Witness: I didn't understand the question to be frank, and I would like to answer Mr. Dodge's question as frankly as I can. I felt that this audience, not only the audience that I was speaking to at Honokaa, but the lawyers sitting here and any audience would feel from merely having the facts reported to them that there was something going on that shouldn't be going on. I felt a factual account—you didn't have to make any comment. A mere, straight factual statement of what was happening was sufficient in itself to convince—to convince people that the facts weren't as they should be.

Mr. Cades: Well, now, doesn't that infer that the facts must be correctly stated?

The Witness: Yes. [412]

Mr. Cades: Doesn't it make it very important to know what facts were presented to them?

The Witness: Well, that is fully in the record,

(Testimony of Harriet Bouslog Sawyer.)

I believe, from my statement to Judge Wiig, I told Judge Wiig everything I could remember that I had said in the Honokaa speech.

Mr. Peters: That's all, is it?

Mr. Dodge: That's all.

The Chairman: We had one other question. I think we had quite a discussion the other day about an equivocal denial, and so forth. And some of the Committee, in discussing the matter, wanted to know whether or not the one statement that seems to be attributed now, at least, by Jack Hall to himself, but which is set forth in Exhibit 1—whether or not you did or you did not make the statement—and that is, according to this exhibit: "She said she wanted to tell about some rather shocking and horrible things that go on in the trial."

The Witness: I told Judge Wiig I have no recollection, and I have no present recollection of having made that. I reconstructed the entire speech and I told Judge Wiig everything I could remember that I said and that I had no recollection of ever having said.

The Chairman: But you wouldn't be able to absolutely deny that you said it? You have no recollection—and you had no recollection at that—— [413]

The Witness: Immediately afterwards I had absolutely no recollection although I recreated the whole speech, and Judge Wiig was asking me after I had told him everything I did say—certain things,

(Testimony of Harriet Bouslog Sawyer.)

and I have no recollection of making that at any time. It doesn't sound like my language.

The Chairman: You don't feel at this time that you can deny that you said it? You say you have no recollection. And that's the same testimony you gave before. But some of the Committee felt that you had not absolutely denied that you had said it.

The Witness: Well, this is—I would like to say this to the Committee. I have absolutely now no independent recollection of what I said at Honokaa. I feel that the things—I tried to the very best of my ability, as an officer of the Court, to tell Judge Wiig everything I had said in context and to explain to him. For me to say now, two years later, something I didn't say to Judge Wiig, I really can't do it honestly. So I feel that what I intended to say to Judge Wiig at the time was—here is what I said—and I didn't say the things that this newspaper reporter attributed to me in the way that they were said. But I don't want now to say to this Committee something I did not say to Judge Wiig two years ago—or more than two years ago—because I have no present recollection.

Mr. Anthony: Mr. Chairman, we agree that the witness will not deny having made the statement now as a result of this colloquy. [414]

Mr. Peters: Would you say, Mrs. Bouslog, that Jack Hall made that statement? He assumed it. He assumed the authorship of it. Would you say that he made it?

The Witness: Well, his was a pretty strong

(Testimony of Harriet Bouslog Sawyer.)

speech on that day, but two years later I can't recall what Jack Hall said and I never made any effort to reconstruct his speech, Judge Peters.

Mr. Dodge: Well, there seems to be only one other question. Is it possible that you made it?

The Witness: It seems to me infinitely, remotely improbable. I just don't think it is possible, no. I don't think it's possible that I made it.

Mr. Anthony: Any further questions?

(No response.)

Mr. Anthony: All right.

(Witness excused.)

Mr. Anthony: We rest.

Mr. Symonds: No, we haven't rested yet.

Mr. Barlow: I haven't heard the word "rest."

(Laughter.)

Mr. Anthony: We have been putting on the prosecution for the last two days. That is why I thought they were still on their case.

Mr. Peters: Well, if counsel on more mature reflection would like to put on further evidence, let's take an adjournment at this time with the understanding that within two or three days you give a cryptic memorandum. [415]

Mr. Anthony: We can settle this in about three minutes, Judge.

(Counsel conferring.)

Mr. Anthony: We rest.

The Chairman: Just in fairness to counsel, there is this Exhibit "A" for identification. Are you intending to——

Mr. Anthony: We are not going to offer them. I will send them back if you want me to take that burden.

Mr. Barlow: Of course I can't force Mr. Anthony to put in the statement. When I gave Mr. Anthony the statement the other day, it was with the implicit understanding that he indicated to me that he was going to put it in evidence.

Mr. Peters: Well, he can change his mind.

Mr. Anthony: We have rested. Is there any further evidence?

The Chairman: I didn't get your comment, Mr. Barlow.

Mr. Barlow: The other day, the Chair practically forced me to give Mr. Anthony statements which I didn't want to give him. Mr. Anthony's representation to the Chair was that he was going to introduce those in evidence, and that is why I gave it to him.

Mr. Anthony: I made no such representation.

Mr. Barlow: All you have to do is consult the [416] record. I would like to have the statements back now.

Mr. Anthony: I don't know what you are talking about.

Mr. Barlow: The statements I gave you.

Mr. Anthony: I have no statements.

Mr. Barlow: Oh, yes you have.

Mr. Anthony: Well, can't we get on with the case?

Mr. Barlow: I'd like to get them back.

Mr. Anthony: Mr. Chairman, would you ask my distinguished opponent to lower his voice and address me with a little courtesy that is becoming.

The Chairman: I think, Mr. Anthony, if you have some statements which you borrowed for a purpose and you are not going to introduce them——

Mr. Anthony: He gave me those statements freely and voluntarily.

Mr. Barlow: I positively did not. It was at the compulsion of the Committee.

Mr. Cades: I looked at you at the time and asked you at the time if it was a commitment.

Mr. Anthony: What was a commitment?

Mr. Cades: The commitment was that you were going to introduce the statement in evidence.

Mr. Barlow: The record speaks for itself.

Mr. Anthony: Well, where is the record?

Mr. Peters: Well, I think we've put a lot of time on this. I have a proposition. Mr. Anthony, this exhibit [417] which has been returned to you is the same exhibit that you demanded of opposite counsel.

Mr. Anthony: That is the doctor's report.

Mr. Peters: What are you talking about?

Mr. Barlow: He has the statement right there.

Mr. Anthony: I would like to have it.

Mr. Barlow: It's our statement. He hasn't in-

troduced it in evidence. What legal right does he have to have it.

Mr. Anthony: He handed it to me.

Mr. Barlow: No, I didn't. I handed it to you because the Committee insisted that I hand it to you, or I wouldn't have given it to you.

Mr. Peters: It seems to me, Mr. Barlow, that you are entitled to have it returned, but I think if Mr. Anthony asked you for a copy of the document that you would give it to him as a matter of courtesy.

Mr. Anthony: Let me have a copy. I haven't had a chance to ask for a copy.

Mr. Peters: That's all right. You get your paper back and you make a copy for Mr. Anthony.

Mr. Barlow: The statements, Judge Peters, belong to the Attorney General. They aren't my statements.

Mr. Peters: I don't care whose they are. They are in your custody.

Mr. Barlow: Now, I'm looking for Mavis' statement. You took Marvis' statement, too. [418]

Mr. Anthony: You want that back, too?

Mr. Barlow: Yes, I want everything back that I gave you.

Mr. Anthony: I'm sorry. You're mistaken.

Mr. Barlow: Well, all you have to do is consult the record. I know that we gave you the statements and he promised that he'd introduce it into evidence. May it please the Committee, had I believed that he wouldn't introduce it in evidence, I would not have complied with the Committee's request to

give him the statement. It is highly irregular and improper and I have never heard of any such procedure, frankly.

Mr. Anthony: I don't know what he is talking about.

Mr. Barlow: All I want is the statement of Marvis Fuller.

Mr. Anthony: Oh, I'm mistaken. I do have it. Let me have a copy of it, will you, please?

Mr. Peters: Now you have got, Mr. Barlow, what you gave to Mr. Anthony?

Mr. Barlow: That's right.

The Chairman: Shall we proceed with the rebuttal?

Mr. Anthony: I would like the understanding that Mr. Barlow is to furnish me with copies of those statements.

Mr. Barlow: I will tell the Committee now that I will not furnish the copies unless I am ordered to furnish them because they are not part of the evidence and they are [419] not part of the record and I don't think the Attorney General has to furnish anybody with a copy of an investigator's report. And that's all this is.

Mr. Dodge: You were using that statement, which was a statement given by your witness, for the purpose of examining. Any such statements are available to other counsel for the purpose of cross-examination. If they are available for that purpose, he ought to have a copy.

Mr. Barlow: For cross-examination. Right?

Mr. Dodge: Yes.

Mr. Barlow: Well, where do we go from here? The cross-examination is over with. The hearing is over with. I get the statements back. Right?

Mr. Dodge: I personally feel that he is entitled to a copy of them.

Mr. Peters: I feel the same way.

Mr. Barlow: All I can say to the Committee is if the Committee feels that he should have a copy, they should tell the Attorney General to make available to Mr. Anthony a copy of this report.

Mr. Anthony: The Committee has got nothing to do with the Attorney General.

The Chairman: Just to dispose of this for the moment, we will take this under advisement and advise you of the ruling of the Committee. Let's proceed with the rebuttal. [420]

Mr. Barlow: With the Committee's permission, I have to put on the testimony on rebuttal sort of in reverse—the second part first because Mr. King is not available at the present time.

The Chairman: Very well.

Mr. Barlow: And as I understand it, he is supposed to be here at ten o'clock.

The Chairman: Well, if he's on the way we can take a short recess. Why don't you put on your other witness?

Mr. Barlow: All right.

MASAJI MARUMOTO

having been first duly sworn, was examined and testified as follows:

The Chairman: Please state your name?

The Witness: Masaji Marumoto.

Direct Examination

By Mr. Barlow:

Q. Are you an officer of the Bar Association?

A. I am president of the Bar Association of Hawaii for the year 1954.

Q. Now, in your capacity as president, did you have a complaint referred to you involving alleged unprofessional conduct of Harriet Bouslog Sawyer?

A. There was a complaint referred to me and it was a carry-over from the previous year. That is, I was vice president [421] in the year 1953 and I was a member of the Executive Board. The matter first came up at the meeting of the Executive Board in July, 1953. Then the action of the Executive Board—I withdraw that. Then Mr. King reported that he had asked the Attorney General to check the records in the Smith Act case and see whether there was any basis for complaint against Attorney Bouslog. The matter was again reported at the Executive Board meeting in November of 1953. At that time we still did not have a report from the Attorney General's office. As I recall, the report from the Attorney General's office came to the Association a few days before the annual meeting was held on December 10th, 1953. Consequently, the matter

(Testimony of Masaji Marumoto.)

was carried over into my administration—that is, to the year 1954.

At the first meeting of the Executive Board, held in January of 1954, I appointed the chairmen of the various committees of the Bar Association. I appointed Mr. J. Edward Collins as chairman of the Committee of Legal Ethics and Unauthorized Practice. And inasmuch as it was a pending matter carried over from the previous year, I referred the report of the Attorney General to Mr. Collins as chairman on the Committee of Legal Ethics and Unauthorized Practice.

Q. Did that committee subsequently make a report to you?

A. The committee subsequently made a report to the Executive Board of the Association, ruling that a complaint be filed against Mrs. Bouslog. However, under the rules then in existence—that is, the rules of the Supreme Court, the [422] Bar Association could not be a complainant. Consequently, the matter was again referred to the Committee on Legal Ethics to study amendments to the Rules of the Supreme Court, and the Chairman of the Committee on Legal Ethics took the matter up with the Chief Justice. And as I recall, the amendment to Rule 19—that is the rule on complaints for unprofessional conduct—I think was amended in April of 1954.

Thereafter, the chairman of the Committee on Legal Ethics submitted a proposed draft of the Complaint. The Executive Board studied the draft,

(Testimony of Masaji Marumoto.)

recommended certain changes, and then, finally, the form of the complaint was, as filed, was agreed upon, and I, as president of the Bar Association, was authorized to file that complaint in the name of the Bar Association.

Mr. Barlow: We have no further questions.

Mr. Anthony: No questions.

Mr. Dodge: You did not identify who made the original complaint?

The Witness: You mean who referred this matter to the Bar Association? Is that your question, Mr. Dodge?

Mr. Dodge: Yes.

Mr. Peters: I don't believe that that's a matter that should be brought out.

The Chairman: No, I don't think so either. I mean, I think—well, it may be within the province of this witness, I don't know. Maybe it isn't.

Mr. Dodge: Maybe it isn't.

Mr. Anthony: I don't think it's relevant, [423] but my understanding is that the matter was referred to the Bar Association by Judge Wiig. I think that fact is not relevant to any proceeding here.

Mr. Dodge: The reason why I asked the question is this—it appeared at the time the Complaint was first filed, there was no method by which the Bar Association preferred the charges. It seems to me that it might be relevant to know whether or not the person who had initially preferred the charge had any desire to press the charge and

(Testimony of Masaji Marumoto.)

whether that was the reason the rules were amended to permit the Bar Association.

The Chairman: I think it would be relevant, but the only reason I thought perhaps Mr. Marumoto wasn't going to be the witness to testify—he wasn't the president.

Mr. Barlow: That's right. That is why I didn't ask him the question—except that the person that made the complaint had a conversation with Mr. King and I would like Mr. King to testify to the conversation. And I will say we are waiting for Mr. King now.

Mr. Anthony: That is purest, rankest hearsay. Let's get on with the hearing.

Mr. Dodge: I will withdraw my question.

The Witness: My testimony will be hearsay on that.

Mr. Barlow: That is why I didn't ask Mr. Marumoto.

Mr. Anthony: So will Mr. Sam King's testimony be pure hearsay. I have no further questions.

Mr. Barlow: I beg the indulgence of the [424] Committee——

The Chairman: We will take a short recess.

(Recess.)

SAMUEL P. KING

having been first duly sworn, was examined and testified as follows:

The Chairman: Please state your name.

The Witness: Samuel P. King.

Direct Examination

By Mr. Barlow:

Q. Mr. King, in 1953, were you president of the Hawaii Bar Association?

The Witness: I was.

Q. Did you have a conversation with Judge Wiig at the end of the Smith Act trial?

A. Yes, he called me.

Q. Would you tell the Committee the reason Judge Wiig called you in?

A. As a matter of fact, that is the only communication I have ever had from Judge Wiig. He called me as president of the Bar to ask me if the Bar Association was going to do anything with respect to the conduct of Harriet Bouslog in connection with the Smith Act trials. My reply to the question to him was—I asked him if the United States was going to do anything about it. That is, the U. S. Attorney's office; namely, Mr. Barlow.

Mr. Anthony: I object to this. I don't think we [425] ought to have this hearsay.

The Witness: That is what I said.

Mr. Anthony: It is still hearsay, Mr. King. I assume that the purpose of the calling of this witness was to establish the fact, and we are prepared

(Testimony of Samuel P. King.)

to admit it, that the complaint which has been filed was made in response to an inquiry of Judge Wiig to the Bar Association to investigate this matter.

The Witness: That is correct. That was practically the end of our conversation.

The Chairman: Is there anything further you want to prove by Mr. King?

Mr. Barlow: No, I just wanted him to testify to the conversation he had with Judge Wiig and what Judge Wiig had indicated to him——

Mr. Anthony: Do you remember when that was, Mr. King?

The Witness: Just after the Smith Act trial was over and just before he left. He was going to the Mainland.

Mr. Anthony: No further questions.

Mr. Barlow: Who is examining him, me or Mr. Anthony?

The Chairman: Well, were there any further questions, Mr. Barlow?

Mr. Barlow: I just wanted to ask him what Judge Wiig indicated the position of the Bar Association should be.

Mr. Anthony: I object to that. [426]

The Chairman: Well, I don't think——

The Witness: Well, he didn't indicate anything.

Mr. Barlow: Did he ask the Bar Association to look into the matter?

The Witness: Yes, he did.

Mr. Barlow: No further questions.

Mr. Dodge: I thought that contradicted with

(Testimony of Samuel P. King.)

what you said a moment ago. Did he ask the Bar Association to look into it or did he ask if the Bar Association was going to look into it?

The Witness: No, he asked us to look into it.

Mr. Dodge: Only the conduct of Mrs. Bouslog or the conduct of all the defense attorneys.

The Witness: Just Mrs. Bouslog—Mrs. Sawyer.

Mr. Anthony: No further questions.

Mr. Barlow: No further questions.

(Witness excused.)

Mr. Barlow: That's our case.

Mr. Anthony: We rest.

The Chairman: Well, the Committee will take it under advisement. Do you want to present particular arguments or file memoranda, or what would you prefer to do?

Mr. Anthony: Judge Peters indicated he would like memoranda.

The Chairman: There are some points we would like to—particularly on the authorities which have been thrown about relative to interviewing jurors and the propriety of it [427] and so forth. Perhaps Counsel should furnish those to the Committee.

Mr. Barlow: They are indicated, may it please the Chairman, in the Bill of Particulars that was filed with the Committee.

Mr. Cades: Bill, what I think would be very helpful to us would be some authorities that bear on the subject of the complaint, how it ties in with the Canons, what the violations are that are alleged

—some authorities along those lines. Because it will save us time in finding those ourselves.

Mr. Anthony: Mr. Chairman, may I make this suggestion, that Mr. Barlow file his memorandum and we be given appropriate time after that, and the matter be presented to the Committee. And I would like to make an oral statement to the Committee at the conclusion of the filing of the memos. Following briefs.

(Discussion.)

The Chairman: I would suggest the Bar Association have two weeks.

(Discussion.)

(The hearing adjourned at 11:17 a.m.) [428]

Certificate of Reporter

I, Ivy W. Parks, do hereby certify that the foregoing pages, numbered one through 123, inclusive, are a full, true and correct transcription of my shorthand notes taken in the matter of Harriet Bouslog Sawyer, also known as Harriet Bouslog, an attorney at law, before an examining Committee in the Chambers of the Supreme Court, Territory of Hawaii on December 6th and 8th, 1954.

Dated this 3rd day of January, 1956.

/s/ IVY W. PARKS,
Official Reporter.

[Endorsed]: Filed March 2, 1956. [429]

[Title of Supreme Court and Cause.]

SUPREME COURT CLERK'S CERTIFICATE

I, Leoti V. Krone, clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that the documents and items listed in the index to the certified transcript of record on appeal from the Supreme Court of the Territory of Hawaii to the United States Court of Appeals for the Ninth Circuit are the originals on file in the above-entitled court and cause except as indicated in said index to be copies and certified copies of originals.

I Further Certify that all of the documents and items listed in said index are attached hereto.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the above court this 28th day of May, 1956.

[Seal] /s/ LEOTI V. KRONE,
Clerk.

[Endorsed]: No. 15109. United States Court of Appeals for the Ninth Circuit. Harriet Bouslog Sawyer, Appellant, vs. Bar Association of Hawaii, Appellee. Transcript of Record. Appeal from the Supreme Court, Territory of Hawaii.

Filed May 31, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15109

In the Matter of:

HARRIET BOUSLOG SAWYER, Also Known as HARRIET BOUSLOG, an Attorney at Law,

Appellant.

STIPULATION AS TO PRINTING OF RECORD ON APPEAL AND POINTS TO BE RELIED ON

It Is Hereby Stipulated by the parties hereto under the provisions of Rule 17 (6) of the Rules of this Court that the following pleadings and documents which are part of the record certified to this Court by the Clerk of the Supreme Court of the Territory of Hawaii shall be printed by the Clerk of this Court:

1. Complaint under Rule 19, filed July 8, 1954. (Pages[1] 5 to 7, Certified Record on Appeal.)

2. Bill of Particulars, dated September 29, 1954, submitted by the Bar Association of Hawaii. (Pages 23 to 29, Cert. Rec.)

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[1]Page numbers referred to in this stipulation appear on the original certified record in pencil at the foot of the pages, excepting those in brackets in Item Four which are the original stamped page numbers.

3. Report of Legal Ethics Committee, filed July 1, 1955. (Pages 35 to 39, Cert. Rec.)

4. Transcript of Evidence before Legal Ethics Committee consisting of two volumes containing 429 pages of testimony taken on November 22, 23 and 24 and December 2, 3, 6 and 8, 1954. (Pages [1] to [429], Cert. Rec.)

5. Return to Order to Show Cause, filed December 2, 1955. (Pages 130 to 162, Cert. Rec.)

6. Suggestion of Disqualification of Ingram Stainback, Associate Justice, and Affidavit of Harriet Bouslog, filed January 11, 1956. (Pages 172 to 177, Cert. Rec.)

7. Suggestion of Disqualification of Philip L. Rice, Associate Justice, and Affidavit of Harriet Bouslog, filed January 11, 1956. (Pages 178 to 192, Cert. Rec.)

8. Opinion of the Court Upon Suggestions of Disqualification, filed January 19, 1956. (Pages 193 to 213, Cert. Rec.)

9. Opinion of the Court, filed April 6, 1956. (Pages 218 to 246, Cert. Rec.)

10. Judgment, filed April 7, 1956. (Pages 247 to 249, Cert. Rec.)

11. Stipulation as to Designation of Record on Appeal (S. C., T. H.) (Pages 271 to 275, Cert. Rec.)

12. This Stipulation.

It Is Further Stipulated that if either party desires to call to the attention of the Court additional portions of the record certified to this Court by the Clerk of the Supreme Court, such party may do so by printing such portion of the certified record in the appendix to its brief.

It Is Further Stipulated that appellant need not serve appellee with her points on appeal, and they may be set forth in appellant's opening brief.

Dated: Honolulu, Hawaii, this .... day of May, 1956.

JOHN T. McTERNAN,

MYER C. SYMONDS,

By /s/ MYER C. SYMONDS,
Attorneys for Appellant.

/s/ EDWARD N. SYLVA,
Attorney General, Territory of Hawaii;

/s/ A. WILLIAM BARLOW,
Attorney for Bar Association of Hawaii.

[Endorsed]: Filed May 31, 1956, U.S.C.A.

[fol. 546a]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15109

In the Matter of Disciplinary Proceedings Against HARRIET BOUSLOG SAWYER, a Member of the Territorial Bar of the Territory of Hawaii.

[fol. 547] Before: Denman, Stephens, Healy, Pope, Lemmon, Fee, Chambers, Barnes and Hamley, Circuit Judges.

MINUTE ENTRY OF ORDER OF SUBMISSION—April 9, 1957

Ordered appeal herein reargued by Mr. John T. McTernan, counsel for the petitioner, and by Mr. A. William Barlow, counsel for Bar Association of Hawaii, and submitted to the court for consideration and decision.

[fol. 548]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15109

Before: Stephens, Chief Judge, and Healy, Pope, Fee, Chambers, Barnes and Hamley, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF JUDGMENT—June 9, 1958

By direction of the Court, Ordered that the typewritten opinion, concurring opinion, and dissenting opinions this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

[fol. 549]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,109

In the Matter of Disciplinary Proceedings against HARRIET BOUSLOG SAWYER, a member of the Territorial Bar of the Territory of Hawaii, Respondent.[1]

Appeal from the Supreme Court of
Territory of Hawaii

Before: Stephens, Chief Judge, and Healy, Pope, Fee, Chambers, Barnes and Hamley, Circuit Judges.

OPINION—June 9, 1958

Chambers, Circuit Judge:

Harriet Bouslog Sawyer became a member of the Territorial Bar of Hawaii in 1941. Since then, except for four World War II years when she was in Washington, D. C., she has been engaged in the active practice of law at Honolulu. A large part of her work has been in the courtroom. Prior to 1941 she had been admitted to practice in Indiana and Massachusetts.

On August 29, 1951, a federal indictment was returned in Honolulu against Charles Kazuyuki Fujimoto and Jack Wayne Hall and five other residents of the Hawaiian [fol. 550] Islands charging them jointly with violations of

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[1] The proceedings in the Supreme Court of the Territory of Hawaii were entitled "In the Matter of Harriet Bouslog Sawyer, also known as Harriet Bouslog, an attorney at law." In this court, the transcript was printed to indicate Harriet Bouslog Sawyer as appellant and the Bar Association of Hawaii as appellees. The pattern being thus revised, counsel followed it on their respective briefs. This court deems the original entitlement more appropriate and by this opinion restores it with only slight modification.

the Smith Act. On Labor Day five days later on the Island of Kauai she was pleading the cause of the defendants before a Labor Day audience, castigating Smith Act cases in general and this case in particular. That speech resulted in no charges against her and the date she commenced representation of defendants in the case is not clear.

The Honolulu Smith Act case went to trial on November 5, 1952. Eventually the trial was concluded and a jury verdict was returned on June 19, 1953, finding the defendants guilty.[2] It is definite that throughout the extended trial she was representing one or more defendants. Sometimes she missed sessions; if so, she was busy on legal research incident to the case.

On Sunday, December 14, 1952, during the period of the trial, she went to the town of Honokaa on the Island of Hawaii[3] and with the defendant Hall addressed a public meeting primarily attended by members of the International Longshoremen's and Warehousemen's Union. Some segment or segments of that union were financing in whole or in part the defense of the seven. The exact purpose of the meeting does not seem to be clear. Hall and Mrs. Sawyer were apparently the main speakers, although there were others. Based on their own subsequent testimony, it would be fair to characterize the gathering as some kind of an old fashioned "indignation meeting." The speeches of the two resulted in publicity throughout the Islands. The newspaper stories caused the trial judge, Honorable Jon Wiig, to suspend temporarily the trial and question Mrs. Sawyer in open court about her speech at Honokaa. When the colloquy was done, Judge Wiig announced he was not satisfied with her explanation and he instructed the U. S. Attorney for the District of Hawaii to make an investiga-

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[2] The convictions were reversed by this court on January 16, 1958, upon the authority of Yates v. United States, 354 U.S. 298. See Fujimoto, et al. v. United States, No. 13,915, —— F.2d ——.

[3] Honolulu is located on the Island of Oahu. The Island of Hawaii is popularly known throughout the Territory of Hawaii as the "Big Island."

tion.[4] (Mrs. Sawyer's explanation and colloquy with the [fol. 551] court is set forth as Appendix C.) No proceedings in the district court were ever brought.

Within a day or so after the verdict, a juror, David P. Fuller, Jr., suffered a nervous breakdown and generally became most incompetent. The case was "on his mind;" how much is disputed as is his rationality at the times of various conversations. Visits from Mrs. Sawyer and from Mrs. Sawyer and Hall to Fuller followed. A sister-in-law, Mrs. Ellen Fuller Cabreros, was present as well as Mrs. Fuller and one or more of the Fuller children. As a consequence of these visits and in support of the motion for new trial Mrs. Fuller, Mrs. Cabreros and Hall all made affidavits as to statements made to them by Fuller,[5] the effect of which, if admissible, would be to prove by Fuller's statements to Mrs. Sawyer and Hall what went on in the jury room in the secret deliberations. The purpose was to impeach the verdict. Parenthetically, such affidavits ought to have been stricken from the file of the Smith Act case. (They were merely not considered.) It is hard to believe that counsel did not know of their inadmissibility.

After the close of the trial Judge Wiig orally requested the Hawaii Bar Association, through its president, to look into Mrs. Sawyer's professional conduct during the trial. This resulted in the association filing on July 8, 1954,[6] with the Supreme Court of Hawaii one complaint with

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[4] A. William Barlow was the United States Attorney for the District of Hawaii during the Smith Act trial at Honolulu and an active participant in the trials. He left the office on September 2, 1954. He appears to have been active in the preparation of the case. He presented it to the legal ethics committee at its hearings which began November 24, 1954. Then, on July 8, 1955, he and the attorney general were appointed to present the case to the court. Barlow's representation in behalf of the complaint, and now the judgment, has continued on appeal.

[5] Mrs. Fuller refused to sign an affidavit prepared for her by Mrs. Sawyer.

[6] Prior to April 21, 1954, under its Rule 19, charges against an attorney were authorized to be filed by the attorney general of Hawaii or "any person aggrieved." By an amendment made on April 21, 1954, charges were authorized to be filed by the attorney general, the Bar Association of Hawaii, or any person aggrieved.

two charges of misconduct in it against Mrs. Sawyer. One charge dealt with the Honokaa speech; the other with the manner of presentation and preparation (the surrounding conduct) of the affidavits. The second charge did not assert falsity, per se, of the affidavits.

[fol. 552] The text of the complaint was as follows:

"COMPLAINT UNDER RULE 19

"To the Honorable, the Justices of the Supreme Court of the territory of Hawaii:

"Comes now the Bar Association of Hawaii, an unincorporated association, and on information and belief complains to this Honorable Court under Rule 19 of the Rules hereof as follows:

I.

"That Harriet Bouslog Sawyer, hereinafter referred to as the Licensee, is and at all times hereinafter mentioned continuously has been an attorney-at-law duly licensed and admitted to practice before all of the courts of the Territory of Hawaii and before the United States District Court for the District of Hawaii, and that the said Licensee is now and during all of said times herein mentioned has been a practitioner before said courts.

II.

"That the said Licensee, while appearing as counsel of record for certain defendants in that certain case in the United States District Court for the District of Hawaii entitled "United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et al., Defendants," being Criminal Number 10495 in said Court, during the course of the trial of said case, to wit, on or about December 14, 1952, did say during a speech to a public gathering in Honokaa, Hawaii, that horrible and shocking things were going on at said trial; that a fair trial was impossible; that all of the rules of evidence were being scrapped so the government could make its

case; that the rules of evidence and procedure were made up as the case proceeded; and that unless the trial was stopped in its tracks certain new crimes would be created.

[fol. 553] III:

"That said Licensee did during the course of said trial and shortly after rendition of a verdict therein visit a juror who was known by her to be indisposed, and thereafter submitted her affidavit concerning an interview with said juror to the presiding judge under circumstances indicating a failure to comply with standards of professional conduct required of practitioners of law licensed to practice before this Court.

"Wherefore, the Bar Association of Hawaii prays this Court to refer this complaint to the Committee on Legal Ethics and Unauthorized Practice of this Court for investigation in conformity with Rule 19 of the Rules of this Court.

"Dated: Honolulu, Hawaii, July 8, 1954.

Respectfully submitted,

Bar Association of Hawaii, By /s/ Masaji Marumoto, Its President.

"[Endorsed]: Filed July 8, 1954.

"[Title of Supreme Court and Cause.]"

The Supreme Court of the Territory of Hawaii referred the complaint to its Legal Ethics Committee for investigation. Before holding a hearing the committee required the Bar Association of Hawaii to furnish a bill of particulars on the second charge. On September 29, 1954, the bill was filed as follows:

"Bill of Particulars

"Pursuant to an Order entered on September 21, 1954, by the Legal Ethics Committee, the following Bill of Particulars is hereby furnished:

"1. Copy of the affidavit of Harriet Bouslog, subscribed and sworn to before a notary public on the first day of July, 1953, signed by the Licensee Harriet Bouslog and filed in the United States District Court for the District of Hawaii on July 1, 1953, in the case of United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et al., Defendants, Criminal No. 10,495.

[fol. 554] "'Affidavit of Harriet Bouslog

Territory of Hawaii,
City and County of Honolulu—ss.

I, Harriet Bouslog, being first duly sworn, on oath depose and say:

On Friday evening, June 26, 1953, shortly before 6:00 o'clock I received a telephone call at my home from Ellen Fuller Cabreros, sister of David P. Fuller who sat as a juror in the case of United States v. Fujimoto, et al. Mrs. Cabreros asked me if I could come and see her brother; that he was seriously ill.

I went to the Fuller home at 1734 Colburn Street and was taken by Mrs. Cabreros and Mrs. Fuller into the front bedroom where Mr. Fuller was lying in bed. He appeared to be gravely ill.

I talked with his wife, Helen Fuller, in the living room of their home in the presence of Ellen Fuller Cabreros and her friend, Grace Ohsiro, and two of the Fuller children. All members of the family present were upset and in tears at the state of Mr. Fuller. Mrs. Fuller stated that she had called a doctor to examine her husband and informed me that her husband had been ill since the return of the verdict, and particularly since early in the morning of Saturday, June 20, 1953, the morning after the verdict was returned.

Mrs. Fuller said that on Saturday morning, the day immediately following the verdict of guilty in the Smith Act case, at about five o'clock in the morning, she found her husband on his knees praying, begging God for mercy, saying he had sinned, that he had lied in the eyes of God; that Jack Hall was innocent and the case was a frame-up; that

Jack Hall is a good man; that those people are doing good for humanity and here someone is trying to block them. She said that in the time since, her husband had told her that the jury only looked at the Government's case and scarcely talked at all about the defendant's side and their case; that he asked her and the children to forgive him because he had done something wrong and it was too late; he said that one of the jurors said the defendants were innocent, and when [fol. 555] the other jurors said, 'Guilty, guilty,' that juror threw a book across the room and said they just as well forget about it. Mrs. Fuller said that her husband had wanted to go see the Judge and confess that he had lied, and once or twice tried to leave the house but was too upset mentally and physically and unable to leave the house by himself; that he fell and struck his head. She said that she and other members of her family urged him not to do anything, not to go to see the Judge and to forget about it, that he would only get himself in trouble and would get them in trouble, and that he might go to jail.

Mrs. Fuller said that when he tried to leave and was unable to, she and other members of the family put him back in bed and tried to keep him quiet; that he kept shouting and crying and praying saying that the case was a frame-up, that he had done wrong, and told the children and her to stay away from him because he was not clean. She said that his condition seemed to get worse and worse as the days went by until on Friday, June 26, 1953, all day he was in bed and did not move or get up at all, and his voice became scarcely a whisper because he was hoarse from the shouting on previous days.

After the conversation with Mrs. Fuller, I went in the bedroom where Mr. Fuller was and asked him if he wished a drink of water. He nodded that he did. During this time, Mrs. Fuller, his sister and her friend were present in the room. Mr. Fuller struggled to talk and make himself heard but because of his weakened physical condition and the loss of his voice, it was difficult to understand what he said. He stated understandably, however, that he wanted help and wanted to get a clear conscience and get the wrong he had done straightened out.

Shortly after my arrival, a Doctor Chang arrived. I was not present in the bedroom during the conversation between Dr. Chang and Mrs. Fuller, although I could hear the conversation between Dr. Chang and Mrs. Fuller from the living room. After Dr. Chang had talked to Mrs. Fuller, Mrs. Fuller told me that the doctor said after examining her husband that there was nothing physically wrong with him, that [fol. 556] he would have to rest in bed, and that it might be necessary to take him to a hospital unless he would get up to go to the bathroom.

After the doctor had left, in the presence of Mrs. Fuller, Mrs. Cabreros and her friend, Grace Oshiro, and Mrs. Fuller's eldest daughter, I gave Mr. Fuller water and he was propped up in bed. Again he tried to talk but seemed to find difficulty in doing so. He said he wanted to talk about the matter and would talk to Jack Hall or anyone at any time to get a clear conscience.

Shortly after this I left, believing Mr. Fuller needed rest. I made arrangements with Mrs. Fuller and Mr. Fuller to come to see him the next day with Jack Hall.

On Saturday morning I was informed by Mrs. Cabreros that her brother was feeling considerably better and wanted to and would be able to see us.

When Mr. Hall and I arrived at the Fuller home about 1:00 o'clock Saturday afternoon, June 27, Mr. Hall put out his hand to Mr. Fuller, Mr: Fuller looked at Mr. Hall for a long time and finally took his hand. Mr. Hall told Mr. Fuller he did not hold anything against him; that he just wanted Mr. Fuller to get well.

Mr. Fuller said to Mr. Hall that from the talk of guilty by other jurors in the jury room, he believed he had to vote guilty to protect his brothers because he was afraid they would be fired if he did not. Mrs. Fuller said that both of Mr. Fuller's brothers, Leonore and Harry, worked for Isle-Ways. Mrs. Fuller said that it wasn't right that they only looked at Government exhibits and not at the defendants' exhibits or case. He said it was a frame-up and said he blamed himself. He said that they looked at Government exhibits and any time someone suggested looked at defense exhibits some juror would say, "Later, later," and they never got around to it. He said that he knew and believed

the defendants were innocent all the time but was afraid of what would happen if he voted not guilty.

He said that the jury in their deliberations decided that the Communist Party was a conspiracy within the first hour [fol. 557] after they began their deliberations. He said that the instruction of the Judge which they used to decide this was the one which told them first to decide whether there was a conspiracy, and they decided the Communist Party was a conspiracy. He said he knew from what he heard the defendants were convicted before the case started on ideas the jurors had before the case started. He said he heard two jurors tell the Judge that they were opposed to Communism during the examination. He said that no secret ballots were taken, so everyone knew how each juror voted. He said some of the jurors said the Government wouldn't bring the charge if it wasn't true. He said that at some time he heard it said that if the defendants weren't convicted it would affect Hawaii's getting statehood. He said that the jurors on the side of the Government said that anybody who was a member of the Communist Party must know what its purposes are and are guilty.

He said that the jury wanted Kawano's testimony. He said that jurors on the defense side asked for Kawano's testimony to show that none of the defendants ever talked about overthrowing or destroying the government.

He said that the juror said a number of times during the deliberations that he had to go to the Mainland and that they should get it over with.

He said that if he voted for the defendants he was afraid the other jurors would tell about it and it would hurt his family. He said one of the jurors played cards in the jury room. He said that there was anger and shouting in the jury room between the persons who were for the prosecution and those who were for the defense. Particularly the jurors for the prosecution got angry with the ones who were holding out.

He said they didn't take any secret ballot, but anybody on the defendants' side had to speak up and then the others would try to get them to back down. He said that he heard jurors talk about Attorney Gladstein and said he was too smart and that he had defended the Communists in New

York and had served a jail sentence. He said that he heard some of the jurors talk about the war against Communism. [fol. 558] He said that they didn't consider the character evidence for the defendants.

He said the second thing the jury decided was that all defendants were members of the Communist Party. The next thing they decided was that if they were Communists they must have intended to overthrow the government. He said that he himself did not believe Kawano and he heard others say they did not believe Muller. He said that after they asked for the instructions they used the one which told them to decide first whether there was a conspiracy, and right off they decided there was, and then talked about whether defendants were members of the Communist Party. He said there was a lot of talk about Bailey.

After this conversation took place, when Jack Hall and I started to leave, Mr. Fuller begged Mr. Hall not to leave and raised his hands above his head and appeared to be praying although the words were not audible. Before leaving, Mr. Hall tried to quiet Mr. Fuller and helped Mrs. Fuller put her husband in bed.

Mr. Hall and I again went to see Mr. Fuller on Sunday, June 28, shortly after 1:00 o'clock in the afternoon. We were accompanied on this occasion by Joseph Kealalio. When we arrived, Mr. Fuller was sitting in a chair in the living room. He kept looking at Mr. Hall but did not speak.

After conversing with Mrs. Fuller for a very short period of time, we came to the conclusion that it would be better to wait until Mr. Fuller was in better physical and mental condition.

When Mr. Hall started to leave, Mr. Fuller again pleaded with him not to leave.

Further affiant saith not.

/s/ Harriet Bouslog.

Subscribed and sworn to before me this 1st day of July, 1953.

[Seal] /s/ J. D. Marques,
Notary Public, First Judicial Circuit, Territory of Hawaii.
My commission expires July 15/53."

[fol. 559] "The Complainant Bar Association neither affirms nor denies the truth or falsity of the allegations and facts contained in the affidavit filed by the Licensee Harriet Bouslog. The Complainant informs the Committee that the above-recited affidavit, its contents, and the manner in which it was obtained furnishes the basis for the charge against the Licensee Harriet Bouslog and that the Complainant will introduce evidence in elaboration of and in corroboration of the charge indicating a failure by the Licensee Harriet Bouslog to comply with standards of professional conduct required of practitioners before this Court and which unprofessional and unethical conduct is condemned in Opinion 109 issued March 10, 1934, by the Committee on Professional Ethics and Grievances by the American Bar Association and by Judge Prettyman in the case of Rakes v. United States, 169 F.2d at pages 745 and 746 and other related cases."

The committee's hearing commenced on November 24, 1954, and after several adjourned sessions was concluded on December 8, 1954. The committee's report was signed on June 9, 1955, and filed on July 1, 1955. The findings sustained the charges. (This report is hereinafter set forth as Appendix A.) The Supreme Court forthwith issued an order to show cause to Mrs. Sawyer.

After a return on the order to show cause, the Supreme Court determined that the hearing before it should be one de novo. However, it was stipulated that the court should make its determination on the record before the committee. No new evidence was received and that court saw no witnesses as such. The court on April 6, 1956, sustained the charges and entered judgment the same day. The judgment suspended Mrs. Sawyer from practice for the period of one year. The judgment has not yet become effective.[7] The Supreme Court's opinion is reported at 41 Hawaii 270. Express reference is made to that decision. Therein many

[7] A division of this Court, Circuit Judge Lemmon dissenting, on May 23, 1956, granted a stay pending the outcome of the appeal herein.

of the procedural events are listed which are not he listed.[8]

[fol. 560] Now, what did Mrs. Sawyer do and say Honokaa and what did she do when she took and prese her affidavit to the U. S. District Court for the Distric Hawaii? The Supreme Court hearing the case on the w ten record had the same record for investigation as we no more. No intendments can be given it on the groun heard and saw the witnesses in person. But still the rec tells a story and a clear story that overwhelmingly p ponderates to sustain the charges.

On the Honokaa meeting we quote the newspaper art written by the reporter Yoshio Matsuoka in the next edi of the Hilo Tribune-Herald, a newspaper published at I on the Island of Hawaii. We do not suggest that the spondent is to be disciplined because of or for a newspa article. However, she might have expected her rema were such as would be publicized. The reason we qu the story from the newspaper is that the findings of b the committee and the Supreme Court implicitly sust the accuracy of the published item. So far as applica to Hall and Mrs. Sawyer, it reads as follows:

> "Smith Act trials are aimed at destroying un and 'must be stopped,' Jack W. Hall and Har Bouslog Sawyer asserted here yesterday.
>
> "Mr. Hall, ILWU regional director now on trial Smith Act charges and Mrs. Sawyer, an ILWU at ney, addressed an estimated 250 persons in the Peop theater.
>
> "Sponsored by the ILWU unity defense commit it was one of a planned series of a such meeting tell communities the 'true facts' of the case since s

[8] That court's opinion, which is supported by the record, s that at every step of the proceedings Mrs. Sawyer was acc procedural due process. To inquire into procedural due pr may well be the limit of the scope of any review that this cou appeals is entitled to make on this type of an appeal. Indeed finds in appellant's specifications of error a canting of them i language of procedural due process, as if counsel were well of this possibility.

sors alleged newspapers cannot be depended upon to tell the facts.

"Mr. Hall, speaking for 15 minutes, claimed it was the opinion of the working press in the trial that if the trial were stopped now, the defendants would be acquitted.

"He declared the prosecution has presented no evidence against the defendants in six weeks of trial and [fol. 561] quoted unnamed 'reporters' as saying 'if this is all the government has, what kind of case is this?'

"No jury in the islands would convict on such evidence, he said, and added he was 'certain' there are 'some courageous people' in the jury.

"He characterized some of the 'things that go on' at the trial as 'unbelievable' and 'frightening.' He said such trials 'can' be stopped and have to be stopped' to halt further 'scare prosecution directed against our union and its members.'

"Mrs. Sawyer, speaking for a half hour, spoke of 'some rather shocking and horrible things that go on at the trial.'

"There's 'no such thing as a fair trial in a Smith act case,' she charged. 'All rules of evidence . . . have to be scrapped or the government can't make a case.'

"They 'just make up the rules as they go along,' she told her listeners.

"Unless we stop the Smith act trial in its tracks here' there will be a 'new crime,' that of knowing what's in books and will lead to 'dark ages of thought control,' asserted the chic and attractive woman lawyer.

"She referred to reading by the prosecution of books 'supposed to have been in a duffel bag' owned by a witness, Henry Johnson. She urged her listeners to tell others 'what a vicious thing the Smith Act is.' Persons are 'tried for books written years ago' by others, she said.

"Mr. Hall said Mr. Johnson was a witness 'just so the government can read a bunch of books.'"

As witnesses, the bar association presented the newspaper reporter and seven other people who were in the

audience. Matsuoka had not his original notes of the meeting but did have an expanded version he had made within a few days after the incident from his original notes at the request of the newspaper's editor. These notes were admissible as recorded past recollection. (The notes are set forth as Appendix B.) The association's witnesses from the general audience seem to have been timid and [fol. 562] of course there had been a period of 23 months between the incident and their testimony. These people did not impeach Matsuoka, but substantially corroborated him. The meeting was largely made up of persons in the I.L.W.U. with which organization Mrs. Sawyer was closely associated. We find great significance in the fact that she produced not a single member of the audience to confirm her version. Of the eight other speakers, she brought only the defendant Jack Wayne Hall to testify in her behalf. We think it is not to oversimplify if we say the substance of the testimony of Hall and Mrs. Sawyer as to the event of Honokaa was that her speech was just generalities, a shotgun attack on the Smith Act in general. Generally, the two were very evasive. Hall's explanation was most suave but is unconvincing even on paper. If their versions were accepted, their speeches were strictly professorial or something like that of a Sunday School teacher explaining to her class what they would see just before she took the class into a courtroom.

It seems clear enough that she said at Honokaa:

1. That horrible and shocking things were going on at the current Smith Act trial in Honolulu.

2. That the trial was not a fair one.

3. That "they" just made up the rules as "they" went along.

4. That unless the Smith Act trial at Honolulu was stopped in its tracks there would be a new crime—people will be charged with knowing what is included in books.

With great deftness Mrs. Sawyer's counsel interweave the defense versions of the testimony into the bar association's evidence pointing the other way. They argue that her talk was just general, couldn't have been anything else,

and specifically did not refer to the trial before Judge Wiig or to Judge Wiig.[9] Without quoting the record extensively, we say the short way (but not the only way) to negative this contention is to quote a statement (during the course [fol. 563] of the hearings) by Mr. J. Garner Anthony, able counsel who represented her before the committee:

> "Mr. Anthony. I will say to the Committee right now—I have read these speeches and I would agree with the conclusion implicit in Mr. Dodge's question, namely that this was a talk about what was going on in the Smith Act trial here in Honolulu. Now let's not fool ourselves about that. We're lawyers here."

In context, when Mr. Anthony says, "This was a talk," he was referring to the Honokaa speech.

It is quite true that Mrs. Sawyer's harsh comments did not incorporate Judge Wiig by name. On this circumstance the respondent relies heavily. But there is a totality about a trial, a unit of the judicial process, which is entitled to protection from those who get their license from a judicial temple, especially those who are engaged in the particular trial. During its progress the courtroom is the only proper forum for a lawyer to vindicate his clients. We cannot accept the plea that Judge Wiig was not called by name or identified as thin and six-feet-two. Such a thought is really one that the judge's person, not what he represents, is entitled to protection.

Far different is this from the contempt cases of the Times-Mirror with its editorials and Bridges with his telegram.[10] This is not a contempt case. The Times and Bridges were not court officers charged with the duty of keeping the temple clean. Nor was this a case of a lawyer unconnected with the case commenting at a public meeting or a lawyer who had carried his case past the point of deci-

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[9] Counsel for respondent in their reply brief insist they don't dispute that Mrs. Sawyer spoke at Honokaa concerning the Honolulu trial. But a fair characterization of the opening brief is that it says, "Mrs. Sawyer didn't really say much about the Honolulu trial, and that was of no consequence."

[10] Bridges v. California, 314 U.S. 252.

sion, now carrying his cause to the people. Nor was it private grousing among friends to which we assume all lawyers are entitled when legal events are not going their way. It was a public meeting.

We reject the clear and present danger rule of third party contempts which is called upon in Bridges v. California. How could we accept the notion that before a lawyer in the very same case could be disciplined his voice would have to rise to a mighty cacophony reaching the point [fol. 564] of causing the audience (a clear and present danger) to march on the courthouse, or to set up such a howl that the judge would be terrified? Maybe for others, but not for counsel of record.

Nor is this a case of a lawyer under strain making an ill-advised speech who later in calmer moments appreciates his error and is humble about it. Respondent is adamant that she only exercised her constitutional right. So, on that she stands or falls. In our view, she falls.

Seriatim we note respondent's points:

1. The specification that Territorial Statute (Section 9701, Re. Laws, Hawaii, 1945) was applied by the court below,[11] so as to deprive appellant of liberty and property without due process of law.

(a) The findings and conclusions are wholly without evidentiary support and unreasonable inferences from the evidence.

(b) Respondent was arbitrarily singled out and adjudged by standards of misconduct other than the usual accepted standards of American Law.

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[11] "Section 9701. Qualifications. The Supreme Court shall have the power to examine, admit and reinstate as practitioners in the courts of record such persons of good moral character who are citizens of the United States of America, and who have taken the prescribed oath of office, as it may find qualified for that purpose, but no person shall be examined, admitted or reinstated unless he is qualified under the Hawaiian Organic Act to vote in the Territory of Hawaii and shall have actually registered as such voter; and the Supreme Court shall have the sole power to revoke or suspend the license of any such practitioners or to dismiss or suspend them from the roll of practitioners for malpractice, fraud, deceit or other gross misconduct."

(c) Respondent was arbitrarily singled out and adjudged by standards of proof other than the usual and accepted standards of clear and convincing evidence.

As to this point, with its three subdivisions, our idea is that, respondent's present view of the evidence just isn't correct. And upon her view of the evidence her challenge rests. Respondent overly dissects the evidence and puts too innocent a gloss on it. We find the evidence as a whole amply and adequately justifies the findings and conclusions. [fol. 565] We see no evidence that respondent was arbitrarily singled out.

On subdivision (b) of the point respondent quotes Circuit Judge Soper in In Re Ades (D.C. Md.), 6 F. Supp. 467 at 481, as follows:

> "An attorney does not surrender, in assuming the important place accorded to him in the administration of justice, his right as a citizen to criticize the decisions of the courts in a fair and respectful manner, and the independence of the bar, as well as of the judiciary, has always been encouraged by the courts."

Also, Ex Parte Steinman, 95 Pa. 220, 238, 40 Am. Rep. 637, is quoted:

> "Because a man is a member of the bar, the court will not, under the guise of disciplinary proceedings, deprive him of any part of that freedom of speech which he possesses as a citizen. The acts and decisions of the courts of this state, in cases that have reached final determination, are not exempt from fair and honest comment and criticism. It is only when an attorney transcends the limits of legitimate criticism that he will be held responsible for an abuse of his liberty of speech. We well understand that an independent bar, as well as an independent court, is always a vigilant defender of civil rights." (In re Troy, 43 R. I. 279, 291, 111 Atl. 723, 727-728.)

These cases themselves turn on respondent. Note that Judge Soper says an attorney has the right to criticize "the decisions" of the courts in "a fair and respectful manner."

Note that Ex Parte Steinman[12] says, "The acts and decisions of the courts of this state in cases that have reached final determination, are not exempt from fair and honest comment and criticism." This subdivision (b) falls entirely when one reaches the conclusion that the comment was unseemly and certainly at the wrong time.

As to subdivision (c), respondent relies heavily, among other things, upon statements of Professor Rodell of the [fol. 566] Yale Law School and again upon her most favorable view of the evidence. We would uphold Professor Rodell's right to say from his Yale vantage point just about what he wants to say. But when he speaks he is not simultaneously harassing the very court in which he is trying an unfinished case. Remove respondent's innocent view of the evidence and again the point is without significance.

2. The point that "the statute, inherently and as applied, without appropriate standards, deprives petitioner of freedom of expression contrary to the provisions of the first and fifth amendments. So construed and applied, the statute in operation and effect creates a prior restraint and censorial control over the public utterances of lawyers in derogation of the independence of the bar and the due administration of justice."

We are not familiar with any law that requires a statute for the discipline of lawyers to categorize in detail the lawyer canons. Further, we see no contravention of the first and fifth amendments. When one concludes that during the trial the lawyer of record is under restraints not applicable to the public in general, and perhaps not even applicable to the defendant, the point is answered.

The sub-point listed on the sixth amendment: "To have (that is, a defendant) the assistance of counsel for his defense," we hold has no merit. To be fearless, is not to lay down by night a barrage on the court. Such conduct is the antithesis of bravery or "the assistance of counsel." The sixth amendment does not say such counsel can be entirely uninhibited. Here again on this point (2) respon-

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[12] Cf. In Re Breen, 30 Nev. 164, 93 P. 997.

dent's own view of the evidence is the projection from which the respondent makes her argument.

3. The third point is: "The judgment of the territorial court was beyond its jurisdiction and contrary to sound policy governing the relations between local and federal courts because it creates a standard of conduct intimately affecting the administration of justice in the latter. In reviewing that judgment this court will make its own evaluation of the facts and determine its own standard."

In short, the point says: Whatever Mrs. Sawyer did was none of the business of the territorial court because the [fol. 567] conduct concerned the federal court. But the state (here the territory) is the primary jurisdiction that sponsors a lawyer, that mainly presents him to the public. It has an interest. Even had the conduct been in open federal court, still the state has an interest. See In Re Isserman, 9 N.J. 269, 87 Atl.2d 903. Cases may arise like the Isserman type in which the state will feel it should stand by and let the matter be entirely handled on the federal side of the street. But that lends no support for an argument that we should say a state or territory cannot act. Rather should the territory be commended than chided.

Point five is that the judgment of the Territorial Supreme Court is arbitrary and excessive. This last point must necessarily assume that the conduct was relatively innocuous. Respondent was an officer of the court. The term has vitality and is not a transparent euphemism.

In all facets of this case in this court there has been the spectre of jurisdiction. This court does not have general jurisdiction to review the work of the territorial courts of Hawaii.[13] Our only scope is narrowly defined by statute. We do not have the plenary powers here that we might

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[13] See 28 U.S.C.A. §1293.

"Final decision of Puerto Rico and Hawaii Supreme Courts

"The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs."

naturally have in such cases as Lavine's, 9 Cir., 217 F.2d 190.

If we have the jurisdiction it hangs by the narrowest thread. We think on the line of such cases as Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232, and Konigsberg v. State Bar of California, 353 U.S. 252,[14] when the charge is made that respondent has been deprived of due process of law under the fifth amendment and that the result impinges on her rights under the first amendment, we are justified in taking the case to look at it to see if the claims of such deprivation have any [fol. 568] validity. In that sense we have jurisdiction. Then we take the case and, in our view, we find that there was no deprivation of constitutional rights. Thus we complete the chain, and one can then logically argue: therefore we never had jurisdiction.[15] On the whole, after examining the record it is our view that the respondent's position basically has little right to be more than a claim that the territorial court took a different view of the evidence than hers and the judgment is a little too harsh. Such claims we wouldn't hear. So, within the limits of permissible advocacy, we suppose, we find the claims on appeal expanded to include claims of deprivation of constitutional rights, claims which we hold are not solid.

On the second segment of the case, the Fuller affidavit, Mrs. Sawyer's counsel meet it by ignoring it completely in their opening brief. Finally, in their closing brief they say that it is moot because the Supreme Court imposed no punishment thereon. As to that point, we cannot agree. The court at page 426 of its opinion in the Hawaii reports (having first announced the suspension of one year in consequence of the Honokaa speech) then proceeded to the matters incident to the Fuller affidavit and finally concluded with:

> "However, in the instant matter, this court will let its hereinbefore expressed disciplinary order suspend-

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[14] Cf. Bell v. Hood, 327 U.S. 678.

[15] Cf. Theard v. United States, 354 U.S. 278, 281.

ing the said respondent licensee from the practice in the territorial courts for one year and requiring her to pay costs—suffice, although also deeming gross misconduct her said repeated interviews with and interrogations of David Fuller."

To us this is a statement that the penalty for the two charges is imposed concurrently—the same penalty for both charges. However, there is a tinge in the pronouncement which possibly indicates that had the Fuller charge been before it alone it might have not imposed a full year's suspension on that charge; we do not know. If we were reversing the case on the findings and penalty on the first charge, we would (because the matter is not clear) refer the matter back to the territorial court to determine clearly [fol. 569] and anew what sanction it intended to apply on the second charge.

The evidence sustains the second charge as appears from the findings of the court's committee and the court itself to which reference is made. It is quite evident, however, that on the second charge alone the respondent would not be able to maintain intact, without breaking, the very thin thread on which we have held there are points which give us the jurisdiction to test the record.

Appellant contends that her punishment applies a different standard to her than has been applied to other lawyers in Territory and that the penalty is too severe; that instead of automatic reinstatement at the end of a year she will have to apply anew—be investigated and take the regular bar examination. Circuit Judge McKinley, sitting pro tem on the Supreme Court, voted for disbarment. That would have been permissible, we think. Many disbarred attorneys become reoriented and again make their way back into the bar.

If the respondent should show some genuine remorse and some appreciation of her error, it might be that the Supreme Court of Hawaii would ameliorate its decision. But so long as she conceives that she has a right to litigate in a given case by day and castigate by night (or at recess) the very court, the honored place in which she is working,

berating the conduct of the trial which she will resume on the morrow, she does not deserve to practice law.[16]

We find applicable here much that is said in In Re Howell, 10 N.J. 139, 89 A.2d 652. There Attorney Howell under great provocation by a newspaper editor sought the editor out and severely beat him with both a riding crop and a rubber hose. This was conduct far removed from litiga- [fol. 570] tion. The court, per curiam, quotes Canon 29 of the Canons of Professional Ethics of the American Bar Association to the effect that a lawyer "should strive at all times to uphold the honor and mainta. the dignity of the profession and to improve not only the law but the administration of justice." The court continued, "An attorney's responsibility is to the courts, the profession and the public and his misconduct may be of such a nature as to engender disrespect for the law which is his basic trust."

Mr. Justice Brennan, then of the Supreme Court of New Jersey and now of the Supreme Court of the United States, wrote a concurring opinion in the Howell case in which Chief Justice Vanderbilt joined. In it he said,

> "We are a society governed by law, whose integrity it is the lawyer's special role to guard and champion. In that society there is no place for a personal code of justice. The preamble to the Canons of Professional Ethics observes 'The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.' Canon 29 obligates every member of the bar to 'strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.' * * * His office is a very badge of respectability and his conduct sullies

[16] Mr. Justice Cardozo when on the New York Court of Appeals said, "Membership in the bar is a privilege burdened with conditions. (Matter of Rouss, 221 N.Y. 81, 84, 116 NE 782). The appellant was received into the ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." People ex rel. Karlin v. Culkin, 248 N.Y. 465, 162 NE 487.

> the office. He 'invites and merits stern and just condemnation.' Cf. Canon 32. His conduct perforce imperils not him alone but the honor and integrity of his profession which depends for its very existence upon public trust and confidence.' * * * Discipline must be imposed not primarily to punish him but to give assurance to the public that the profession is deserving of its trust and confidence and will demand that all lawyers meticulously adhere to the high standards imposed by the profession upon itself."

It is true that Lawyer Howell had entered a *non vult* or *nolo contendere* plea in a trial court to a charge of simple assault and battery; thus the doing of a criminal act was implicitly conceded. But we would think simple assault and [fol. 571] battery was a crime not involving moral turpitude per se. The New Jersey Supreme Court had to go on and examine de novo the special facts of the case, and it did.

Here in Mrs. Sawyer's case the Supreme Court's findings bring us to the same point: she did that with which she was charged. And it should be noted that Howell was abject in admitting his error. Notwithstanding his contrition, the court suspended him from the practice of his profession for six months.

Mrs. Sawyer's conduct has neither the ameliorating circumstance of Howell's rage being instantaneous with perhaps great provocation (and, with only 40 minutes to cool down), nor of his later recognition of his error.

We agree that the censured conduct of respondent was grossly improper.

Judgment affirmed.[17]

In the Matter of Disciplinary Proceedings against Harriet Bouslog Sawyer, a member of the Territorial Bar of the Territory of Hawaii, No. 15,109.

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[17] Circuit Judge Denman, then Chief Judge, presided at the oral arguments of the foregoing case heard en banc. Between the date of hearing and the date of decision he retired. He now deems it inappropriate that he participate in the en banc decision. Circuit Judge Lemmon heard the oral arguments, but his death occurred on April 26, 1958.

Appendix A

Report of Legal Ethics Committee

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the Territory of Hawaii:

The Legal Ethics Committee, pursuant to a letter from the Honorable Edward A. Towse, dated July 8, 1954, has investigated a complaint filed by the Bar Association of Hawaii and makes this report of the charges, facts and conclusions of the Committee pursuant to Rule 19.

The Charges:

The two charges made in this complaint have to do with (1) the alleged improper conduct of Mrs. Harriet Bouslog [fol. 572] Sawyer, referred to in this report as "Mrs. Bouslog," in making a speech at Honokaa, Hawaii, on December 14, 1952, and (2) the alleged improper conduct in connection with her interview of the juror David P. Fuller, as more fully set forth in the Bill of Particulars dated September 29, 1954.

The Facts:

The Committee finds that Mrs. Bouslog was one of the attorneys appearing for certain defendants in the United States District Court for the District of Hawaii entitled "United States of America, Plaintiff, against Charles Kazuyuki Fujimoto, et als., Defendants," being Criminal 10495 in that Court; that on December 14, 1952, during the course of the trial, she made a speech at a public gathering at Honokaa, at which she said, among other things, that horrible and shocking things were going on at the trial; that there was no fair trial in the case; that they just made up the rules as they went along; that unless the Smith Act trial was stopped in its tracks in Honolulu there would be a new crime.

With respect to the charges in paragraph III, the Committee finds that after rendition of the verdict in Criminal 10495, mentioned above, Mrs. Bouslog visited one of the jurors, David P. Fuller, Jr., while he was in a very poor mental and physical condition and thereafter submitted

her affidavit concerning an interview with the juror to the Presiding Judge.

While the affidavit of Mrs. Bouslog indicates that on the first occasion he was gravely ill, the Committee finds that she did not fully disclose to the Court the condition of Mr. Fuller, nor the fact that she had attempted to get affidavits from Mrs. Fuller, who refused to sign one, and could not get an affidavit from Mr. Fuller because of his condition.

Conclusions and Recommendations:

The Committee is of the unanimous opinion that the Bar Association of Hawaii has sustained the allegations in paragraphs II and III of its complaint and that Mrs. Bouslog, in imputing to the Judge unfairness in the conduct of the trial, in impugning the integrity of the local Federal courts and in other comments made at Honokaa, was [fol. 573] guilty of violation of Canons 1 and 22 of the Canons of Professional Ethics of the American Bar Association and should be disciplined for the same.

The Committee is likewise of the unanimous opinion that it was improper for her to submit her affidavit concerning the interview with the juror Fuller to the Presiding Judge under the circumstances under which it was submitted. There are differences of opinion within the Committee as to whether her interviews with juror Fuller were proper, as to whether they were in violation of Canon 23 of the Canons of Ethics and as to whether she should be disciplined, although the majority think she should be disciplined with respect to the charges in paragraph III.

Dated: Honolulu, Hawaii, June 9, 1955.

Respectfully submitted,

/s/ C. Dudley Pratt, Chairman, /s/ Milton Rodes, /s/ Clifton H. Tracy, /s/ E. C. Peters, /s/ [Indistinguishable], Of the Legal Ethics Committee.

I concur in the findings of the Committee that the conduct of the respondent was, with respect to the Honokaa speech

and with respect to the matters concerning the juror, improper.

I do not concur in the conclusion that the other members of the Committee have reached with respect to the recommendations we should make to the Court.

This is a proceeding under Rule 19 of the Rules of the Supreme Court. This Committee's authority to act and its duties are set forth in that Rule.

> On completion of the hearing the Committee shall file with the Court its findings of fact, conclusions of law *and recommendations as to action to be taken* by the Court in the matter * * *.

[fol. 574] I do not believe the italicized words mean only that this Committee should merely recommend that disciplinary action should or should not be taken. I believe that the Rule means that this Committee has a duty to go further and recommend the nature of the discipline it feels is proper.

I would recommend that, for the improper conduct of Mrs. Bouslog with reference to the Honokaa speech, she be suspended from the practice of law for such period of time as the Court may deem just and proper. I believe this to be by far the more serious of the two charges.

I would recommend that, for the conduct regarding the juror which this Committee has found to be improper, she be reprimanded.

Dated: Honolulu, T. H., June 9th, 1955.

/s/ R. G. Dodge.

[Endorsed]: Filed July 1, 1955.

Appendix B

Matsuoka's "Notes"

Notes on Mrs. Harriet Bouslog Sawyer's speech at People's theater, Honokaa, Sunday, December 14.

She followed Samuel M. Bento, who said he wanted to say good morning to the Tribune-Herald, pointing generally toward the paper's reporter from Hilo and the paper's

Honokaa correspondent who were sitting side by side. Mrs. Sawyer preceded Jack W. Hall. She began speaking at 11 a.m. and ended 11:30 a.m.

Notes on what she said in the order of how she proceeded: The trial is really a trial of Jack Hall to which has been added six others. It's to get at the ILWU.
Said she wanted to tell about some rather shocking and horrible things that go on at the trial.

She was appointed some years ago (3 or 4 years ago) by a court to defend a man who had no money to hire his own [fol. 575] counsel. He was charged with pimping and procuring. The complaining witness in the case was a woman who had been in business 20 years in the territory who claimed she had reformed and repented but this vicious man had driven her back again into the business. It turned out that the hotel where he had kept her had 27 doors unlocked. Likened this to pukas in the Smith act.

Said men in power are trying to put men in jail because of their thoughts. and books written before he was born.

One of the reasons Jack Hall is on trial is because it is said he once got a book, the Communist Manifesto, written in 1898, before Jack Hall was a gleam in his father's eye.

She quoted from manifesto: a spectre is haunting Europe; the spectre is communism. she explained spectre means ghost. said spectre still seems to be haunting people today.

She turned next to conspiracy. noted there was a conspiracy trial in 1937 of filipino brothers. conspiracy to advocate violence and criminal sindicalism. explained conspiracy means agreement. government never has used conspiracy when it had a case. when it hasn't got enough evidence it lumps a number together and says they agreed to do something. the government does not say . . advocated overthrow but says they agreed to. conspiracy means to charge a lot of people for agreeing to do something you have never done.

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touched on myth of agents of fbi. they're supposed to be extra special. radio programs, movies, publicity tell how

wonderful they are. but when you see hundreds of tax fraud cases go by and when they spend most of their time investigating people's minds it's time to cut them down to size. said she had told this to a honolulu gathering. labor day? fbi agents should be called federal cops. said has slogan: put away your thoughts here come the federal cops. cops push people around.

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paul crouch. difficult to understand why he's witness. but he was here in 1924; because he was once in Hawaii, so guess that's why. he testified what he did in russia in 1927. he told what he was told by generals etc. usually you cannot testify on what people told you when there is no chance for those to be cross examined. aileen fujimoto was four [fol. 576] years old then. what has crouch's galloping over the plains of russia got any bearing on her. jack hall was 13. but the government goes on with testimony for two weeks on what crouch did between 1927 and 1941 without ever mentioning the defendants.

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he told of infiltration of the armed forces and plots . . . it used to be the idea that a man is responsible for what he did and said—not what someone else did. not a single one of the defendants was of age at the time he's talking about. the jury is not going to pay attention to what Crouch says. but it's the old smear. The prosecution says crouch did this and that and we (prosecution) say the defendants are communist party members so they must have done the same. but government propaganda has been going on for 10 years before the jurors went into the jury box.

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it's enough to say a person is a communist to cook his goose. the government says there was an agreement to violate the smith act which was passed in 1940. then the defendants agreed to violate it before it was passed. crouch said he was at a communist meeting in 1941 and saw five or six people there. it was the first time he'd seen them. but he was satisfied when he came to honolulu 12 years later that one was Koji Ariyoshi. she urged audience try to recall what they did 12 years ago. said she can't recall details. god knows

no one has a memory that good. yet they use this kind of testimony.

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why? because they will do anything and everything necessary to convict.
some of the witnesses testified differently from what they testified previously. the government knows this but deliberately goes ahead and have him say things in order to convict. mentioned izuka in reinecke trial testimony. said something about izuka saying he didn't know the party advocated overthrow of government until he got out of party.
witnesses testify what government tells them to. just as they read portions of books like overthrow the government [fol. 577] and leave out the rest which says czarist government showing it dealt with russia.

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johnson testimony. said he came back from san francisco with communist hooks and literature in a duffle bag. he said when he got to Honolulu he told Jack Hall the names of some of the books. then the government for two days reads from books supposed to have been in the duffel bag. they're not dealing with what jack hall said. on cross examination johnson said he did not tell the names of the books but just showed jack hall the duffel bag. so jack hall violated the smith act because he saw a duffel bag with some books on overthrowing the government in it. it's silly. why does the government use your money and mine to put people in jail for thoughts

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the government has carried on a barrage of propaganda for many years and expects people in the jury to have hysteria just hearing about communist is enough to jail. said has a friend who worked for sears roebuck and has family of three children and wife. he made a terrible mistake one time. in 1941 he lived in the same house as jack hall. the fbi wanted him to testify. he said i feel jack hall is one of the finest people i have known. apparently the fbi didn't like this. so they suggested to sears and roebuck to fire him because he wouldn't cooperate with the government.

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he wasn't fired so they went to the Los Angeles and Chicago offices of sears and roebuck and convinced them he had to be fired. he was fired because he refused to be a stool pigeon and informer. the government gets away with it by making people fear that if they don't do as it wants they'll be branded red and lose their jobs.

there's no such thing as a fair trial in a smith act case. all rules of evidence have to be scrapped or the government can't make a case.

referred to her habeas corpus move in the palakiko—majors case.

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said a woman came to her with report she heard vernon stevens say he bet a confession out of one of them. she testified but the supreme court refused to let the evidence [fol. 578] in because vernon stevens was not here and had no chance to deny this. with the same situation a federal judge sitting on a federal bench permits crouch to testify about 27 years ago. what was said then. in the previous case it was the life and death of one. and yet here they permit a witness to tell what was said when a defendant was five years old.

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there's no fair trial in the case. they just make up the rules as they go along. the first smith act case was in 1949 of the new york top leaders. attorneys contended they should have the right to say what they did from 1924. medina permitted them to say what the defendants themselves did from 1934 on. but the government can't make a case if it tells just what they did so they widened the rules and tell what other people did years ago, including everything including the kitchen sink.

unless we stop the smith trial in its tracks here there will be a new crime. people will be charged with knowing what is included in books. ideas.

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mentioned los angeles trial in which someone said there was no evidence that someone had instructed persons not to read some books.

said there'll come a time when the only thing to do is to keep your children from learning how to read. then not

only will unions be destroyed by so will freedom of thoughts and action. there'll be dark ages of thought control when people won't be able to speak freely in taverns and other places.

she urged audience to go out and explain what a vicious thing the smith act is. people are tried for books written years ago.

[fol. 579]

Appendix C

The Sawyer Explanation to District Judge Wiig

Extract from Transcript of Proceedings in United States v. Fujimoto.

Afternoon Session—December 16, 1952

(The Court convened at 1:15 p.m.)

(Jury absent.)

The Court: Mrs. Bouslog, when were you admitted to practice in this Court?

Mrs. Bouslog: In the year 1941, your Honor.

The Court: Do you remember the date?

Mrs. Bouslog: The certificate, your Honor, hangs in my office, but I believe it was some time in December in 1941. I was notified that I had passed the bar examination in the Territory, as I recall, after Pearl Harbor. So I believe it was the latter part of December in the year 1941.

The Court: I have before me a newspaper clipping from the Honolulu Star Bulletin of Yesterday afternoon in which it purports to quote statements made by you on December 14, 1952, at Honokaa, Hawaii, at a meeting. Do you have anything to say as to the newspaper report?

Mrs. Bouslog: I do indeed, your Honor. I want to say that I welcome the opportunity to state to the Court the substance of what was said at that meeting, and I assure your Honor that the excerpts wrested from the context will not reflect the substance of the context of that speech. Of the words, attributed to me in quotes, I recall clearly that I did say, "There is no such thing as a fair trial in a Smith Act

case." I explained, your Honor, the reason for that statement. The reason, I said, was that ideas and books are on trial in a Smith Act case, and that years of propaganda which preceded the enforcement of the Smith Act both by the Government and by the Commercial press has created such an atmosphere of hysteria that the very word "Communism" has become such a deadly label that it is almost impossible for jurors to put out of their minds all they have read and heard outside the courtroom. In substance, your Honor, I said in respect to this statement no more than de-[fol. 580] fense counsel said in the motion on file before this Court for a transfer of the place of trial. In substance, I said no more than what Justices Black and Douglas, dissenting, said concerning the Smith Act in the Dennis case.

The balance of the words other than the ones I have just quoted—which I recall clearly having said—the balance of the words attributed to me in quotes, either I did not say or they are so torn from context as to wholly distort my speech as a whole. Apparently Mr. Walsh is not satisfied to try my clients on sentences or parts of paragraphs ripped from context but he desires to try me on sentences, on portions of sentences, and words extracted from the context in which they were said. This, I am sure, that this Court will not permit.

My speech was extemporaneous, an extemporaneous speech, your Honor. I have no notes as to the exact words or the full content. Upon learning, however, this morning from my colleagues that your Honor was going to give me an opportunity to state the substance of the remarks which I did make, I dictated to my secretary the substance of the speech.

I began my remarks by explaining what the Smith Act is and how the prosecution goes about trying a Smith Act case, reading excerpts from books that were written many years before the defendants in this case were born. I spoke of the difference between a Smith Act case and the ordinary criminal case in which a person is tried for what he has done, not for what he thinks—what is in his mind. I explained what a conspiracy is and showed how it can be used to charge a group of persons with agreeing to do what the prosecution cannot prove any single individual did.

In this respect, your Honor, my explanation was drawn from the criticism of the Senior Circuit Judges of conspiracy charges which we cited to your Honor in the brief which we filed and indeed quoted the language of the Supreme Court itself on conspiracy and calling it a dragnet.

My remarks at the meeting at Honokaa concerning the rules of evidence were directed towards the conduct of the prosecuting attorneys in Smith Act cases, how they use a conspiracy charge for the very reason that it permits them to introduce evidence that would not be admissible under the ordinary criminal charge.

[fol. 581] I said that in Smith Act conspiracy cases the prosecution had gone beyond the scope of the rules of evidence, even in other conspiracy cases. My remarks were no more in substance than has been stated to this Court in the memorandum filed by defense counsel, submitted in support of the motion to strike the entire testimony of the witness Crouch. In fact, your Honor, my objective in the speech at Honokaa was to state in ordinary language that laymen would understand the content of the decisions of the courts cited in that brief.

The second half of my speech—after speaking generally concerning the tactics of the prosecution in the Smith Act cases and the Smith Act—was devoted to a discussion of the evidence on which the prosecution in this case is seeking to convict Jack Hall and the other six defendants in this case. I used several illustrations. One, I used the testimony of Paul Crouch about riding horses on the Russian plains and talking to a Russian general in 1927. I pointed out the defendants couldn't have possibly cross-examined the Russian general, first, because he had been dead for many years, and second, even if he weren't it would probably be impossible since he is a Russian. I pointed out at the time that Paul Crouch was in Russia, Eileen Fujimoto was five years old and Jack Hall, aged thirteen, was just ready to start high school in Southern California. Yet I said Crouch's testimony of his plotting to infiltrate the Armed Forces and to commit acts of espionage and sabotage while in Russia in the year 1927 was being used against the defendants in this case.

Another illustration that I used from this trial was the testimony of Henry Johnson who testified that some time in 1945 or 1946 he showed Jack Hall a duffle bag and told him it contained Marxist literature. That, although Johnson admitted on cross-examination that he didn't tell Jack Hall what books the duffle bag contained, in effect the fact that Jack Hall had seen the duffle bag was used as a basis for introducing numerous books in evidence which Johnson testified the duffle bag contained.

Another illustration I used was that of the testimony of Ichiro Izuka who testified under oath in the Reinecke case that he didn't learn until after he left the Communist Party that it advocated the use of force and violence, and that therefore his testimony was of no value to the prosecution [fol. 582] to prove the crime charged against these defendants but that nevertheless the prosecution called him and used him in this case to testify to matters completely at variance with his sworn testimony in prior cases.

To illustrate the difference between the application of the rules of evidence in ordinary cases and in Smith Act cases, I told how the Supreme Court of the Territory of Hawaii had refused in the Palakiko and Majors case which involved a question of life and death to permit the testimony of Mrs. Frances Hughes of an admission by Detective Vernal Stevens that he had struck Palakiko before he obtained his statement on the technical ground that no foundation was laid because Vernal Stevens was out of the Territory.

Yet in Smith Act cases I pointed out the prosecution puts on witnesses to testify to things that were said and done by third persons not only on the mainland of the United States but in other countries halfway around the world, and even though the defendants here do not know, have never had any contact with the third persons mentioned and never heard of them before this trial.

I closed my case or my speech by saying that a new crime is being created, the crime of reading. I quoted exactly from, to the best of my recollection, from the closing argument to the jury by the prosecution in the Los Angeles case, in which the prosecution said the defendants asked people to read, read, read, and that they never at any time told people not to read anything. I said that if Smith Act prose-

cutions continue, the only safe thing will be not to know how to read. And that Smith Act prosecutions, unless stopped, will lead to thought control. I said further that the Smith Act can be stopped here in Hawaii if enough people began to understand the danger of such prosecution.

As the Court can see, my remarks were directed towards the conduct of the prosecution and were not directed towards the Court. By that I do not mean to say that the defense counsel in any way recede from the position that was taken in the brief filed in connection with the Crouch testimony, in which we believe we have cited authorities showing that your Honor had admitted evidence which is not admissible even in the ordinary conspiracy case.

[fol. 583] I feel, your Honor, that when the words—and you will note in some cases they are single words—are put back into the context of the whole speech that it must be clear to your Honor that there was no contempt of this Court involved in the speech and that the criticism was directed to the conduct of the prosecution in Smith Act cases.

The Court: Before you sit down, I would like to ask you, did you say at that meeting that things go on at the trial, referring to this trial, that are unbelievable and——

Mrs. Bouslog: No, your Honor, that was not even attributed to me, I believe. That, I believe was not attributed to me even in the newspaper account.

The Court: Did you say that some rather shocking and horrible things were going on in this trial?

Mrs. Bouslog: I have no recollection of that statement. I did undertake to explain in factual terms exact testimony that has taken place in this case, of which I gave the four illustrations which I have cited to your Honor. I have no recollection of those words.

The Court: Did you say that all rules of evidence have to be scrapped or the government can't make a case and just make up the rules as they go along, or words to that effect?

Mrs. Bouslog: No, your Honor. I explained in the substance of my speech that I paraphrased for the laymen the rules of evidence contrasted with the kind of offered evidence by the prosecution in Smith Act cases, all of which is set forth in the memorandum to your Honor in which it is

shown that there is a great—that the prosecution seeks great leeway from the ordinary rules of evidence.

The Court: You realize that this trial is still pending?

Mrs. Bouslog: Yes, your Honor.

The Court: And has been pending now for six weeks?

Mrs. Bouslog: Yes, your Honor.

The Court: That you are counsel of record?

Mrs. Bouslog: Yes, your Honor. And may I say, your Honor, that I think there is not one word of what I said at Honokaa that is in any way, that in any way shows any contempt for this Court, that my remarks were directed, as I said, primarily to the conduct of the prosecution in a Smith [fol. 584] Act case. And, of course, more learned and more prominent people than I have said much stronger things concerning the techniques of the prosecution in all Smith Act cases beginning with the Dennis case and all of the pending cases. And those remarks in context were directed generally to the Smith Act cases. Only the specific illustrations from this trial related factually to what goes on in this courtroom.

The Court: Well, Mrs. Bouslog, I am not satisfied with your explanations to the Court. I think this matter requires further investigation. I am going to instruct the U. S. Attorney to make a further investigation of this matter and if he finds under the provisions of Rule 42(b), a Notice and Order to Show Cause should issue, then he will do so.

Mrs. Bouslog: I will say to the Court that I am happy to have any investigation made of what I said. I think perhaps that it is rather unfortunate that the Court refers it to the prosecution whose conduct I was critizing in the case rather than to an impartial person.

The Court: Well, in that respect, Mrs. Bouslog, if you feel that there is any partiality on the part of the U.S. Attorney, I have no reluctance whatsoever to refer the matter to an independent attorney. I think you should know that throughout this trial I have done everything that I could to assure to the defendants a fair trial. Counsel for the defendants naturally have disagreed with me on some of my rulings on evidence. That is only natural. Or the admission of documents in evidence. But in every other matter there has come up since the time the jury was selected, the mat-

ter of fair play on giving the defendants the benefit of the doubt, I have almost consistently done so. It is very surprising to me to read this article in the newspaper after one of your associate counsel, Mr. Wirin, took occasion a week or so ago to come to my chambers during a recess and state that he had been advised or had heard—I didn't ask him the source of his information—that Judge Wiig would not give the defendants a fair trial, and he wanted to state to me at that time that in his opinion the defendants were receiving a fair trial. Again, Mrs. Bouslog, I have done everything I could in this trial to prevent any outside influences from entering into the presentation of evidence and the matters that [fol. 585] go to the jury. So when this case is in their hands it will be decided upon the evidence and what has taken place here in the courtroom.

This publication in yesterday afternoon's paper is the first that I have seen which is contrary to what I had hoped for, what I had hoped would continue throughout the trial. The factual reporting of the principal or the Honolulu Advertiser and the Honolulu Star-Bulletin had been, I think, fair. I have noticed no editorial comment or other comments which would in any way have an effect upon giving a fair trial to these defendants. And this caused a great deal of concern when it was called to my attention by Mr. Walsh yesterday afternoon. I trust that nothing will happen from here on which will affect this trial in any way. Will you please call the jury?

Mr. Barlow: Am I to understand, your Honor, that I am going ahead with the investigation?

The Court: Yes.

BARNES, Circuit Judge, concurring, in whose concurring opinion Judges Healy, Fee and Chambers concur:

I agree with Judge Chambers in his holding that the respondent's conduct was grossly improper.

Unquestionably, this Court has jurisdiction in this cause where constitutional objections are raised as to a disbarment proceeding, because the question of according due process of law to the lawyer is always involved. Therefore,

this Court has the authority to examine the proceedings. The panel which first heard the cause and now the whole court, with one dissenting judge, agree to this proposition.

Due process of law, both substantive and procedural, was accorded. As the opinion of Judge Chambers shows, the Hawaii Bar Association filed with the Supreme Court of Hawaii a complaint against Harriet Bouslog Sawyer, which contained two charges of professional misconduct. Since Mrs. Sawyer was duly and regularly admitted by the Supreme Court, she was an officer of that court and responsible to it for alleged professional misconduct. In accordance with its own Rule 19, that tribunal referred the cause to its [fol. 586] Committee on Legal Ethics and Unauthorized Practice for investigation, which required the Bar Association to furnish a bill of particulars. The Committee held several sessions of the hearing and filed a report containing findings sustaining the charges. The Supreme Court issued an order to show cause, which was directed to and served upon Mrs. Sawyer, who filed a return thereto. Thereupon, the Supreme Court held a hearing de novo. Mrs. Sawyer was accorded the right to and did appear at that hearing in person. She was given the opportunity to be heard, and took full advantage of the occasion. Mrs. Sawyer was given the right to be represented by counsel. Eminent and able counsel of unblemished reputation did in fact vigorously represent her.

The record as a whole, at a minimum, shows that there was not only adequate but substantial evidence to sustain a judgment cancelling her license. Furthermore, irrespective of the dissents, we believe the evidence clearly convincing and sufficient to sustain the judgment beyond a reasonable doubt.

The Supreme Court then suspended Mrs. Sawyer from the exercise of her office, which it had conferred upon her "during good behavior," for professional misconduct, ascertained and declared upon adequate and convincing evidence by the judgment of that tribunal after she was afforded opportunity to be heard both personally and by counsel.

The Supreme Court of Hawaii is not a court organized under Article III of the Federal Constitution, but rather

under Article IV, section 3, clause 2 of that instrument.[1] The power of Congress to restrict or abrogate appellate review from such a tribunal is paramount.[2] There is doubt whether appellate courts organized under Article III can [fol. 587] be constitutionally burdened with review of administrative functions or housekeeping regulations or determination of a legislatively controlled tribunal.[3]

Even in cases where Congress has permitted review of the territorial Supreme Courts, the appellate courts of the judicial system proceed with extreme caution where local customs, practices or the subtle influences or nuances of customary local law may be present.[4] The same caution should be employed in a parallel situation if local custom of a legislative tribunal dictated that its licentiate should not obstruct the course of justice in another court.

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[1] " • • • the territorial courts are 'legislative' courts, created in virtue of the national sovereignty or under Art. IV, §3, cl. 2, of the Constitution • • • ." *O'Donoghue* v. *United States*, 1933, 289 U.S. 516, 535; *Ex Parte Bakelite Corporation*, 1929, 279 U.S. 438, 449-450; *Mookini* v. *United States*, 1938, 303 U.S. 201, 205.

[2] *Ex Parte Wilder's Steamship Company*, 1902, 183 U.S. 545. Jurisdiction of this Court over certain final decisions of the Supreme Court of Hawaii is conferred by 28 U.S.C.A. §1293.

[3] " • • • this 'Constitutional' court • • • is empowered to act only in justiciable 'cases' or 'controversies' within the meaning of Article III of the Constitution, and so has no jurisdiction to review 'administrative or legislative issues or controversies'." *Boggess* v. *Berry Corporation*, 9 Cir., 1956, 233 F.2d 389, 392. See also *Application of L.B. & W. 4217*, 9 Cir., 1956, 238 F.2d 163.

[4] *Waialua Agricultural Co.* v. *Christian*, 1938, 305 U.S. 91, 108-109; *De Castro* v. *Board of Commissioners*, 1944, 322 U.S. 451, 456. "Our power to reverse rulings of the territorial court on law or fact is limited to cases of manifest error." *Pioneer Mill Co.* v. *Victoria Ward*, 9 Cir., 1946, 158 F.2d 122, 125, cert. den., 330 U.S. 838.

"We must note that our jurisdiction to review the action of the Hawaiian courts • • • is a narrow one. • • • the question is what standards of fundamental fairness • • • are required by the Fifth Amendment, and whether those standards were here complied with." *Palakiko* v. *Territory of Hawaii*, 9 Cir., 1951, 188 F.2d 54, 60, cert. den., *sub nom*, *Palakiko* v. *Harper*, 347 U.S. 956; *Alford* v. *Territory of Hawaii*, 9 Cir., 1953, 205 F.2d 616, 617-618.

I read the original Matsuoka notes (not the newspaper story thereafter written) as a direct attack upon Judge Wiig's conduct of the trial and his rulings therein; that Mrs. Sawyer charged that "this" was not a fair trial; that Judge Wiig's rulings on evidentiary matters were unfair; that Judge Wiig, with the govern. ent prosecutors, "make up the rules as they go along;" that in this case all rules of evidence were "scrapped;" that the conduct of this Smith Act trial was a crime that had to be stopped. How such charges can be characterized as being "devoid of any attack upon Judge Wiig or his Court," or to constitute "not even a scintilla of evidence" of an attack upon the integrity of Judge Wiig, as does my brother, Judge Pope, is beyond my powers of comprehension.

[fol. 588] Whether such acts charged to Judge Wiig were "shocking and horrible" is beside the point. Mrs. Sawyer chose to characterize them as such.

To conclude that Mrs. Sawyer was referring to Smith Act cases generally, and to "all Smith Act cases," but was not referring specifically to this one case then on trial, is to my mind nonsense. *Her* attorney at the trial clearly understood "that this was a talk about what was going on in the Smith Act trial here in Honolulu. Now let's not fool ourselves about that. We're lawyers here." Mrs. Sawyer said: "Unless we stop *the* Smith [Act] trial in *its* tracks *here* there will be *a new crime.*" Mrs. Sawyer was then and there referring to but one Smith Act case; *the* Smith Act case then before Judge Wiig. Any other interpretation flys (sic) in the face of reality and renders the English language not understandable.

The point urged by Judge Pope that "Judge Wiig did not rule upon Crouch's testimony until long after the speech," seems to me to compound the offense rather than excuse it. If the court had not yet made its ruling on admissibility, even more reason existed why Mrs. Sawyer should not attempt to influence the court's subsequent order by inflaming her audience outside the courtroom during the trial's progress. This was a criminal trial by jury who were not impounded but were permitted to mingle with the community when the court was not in session. Even customary media

of communication are restricted to "fair comment" in reporting the proceedings.

To me, this case no more involves "freedom of speech" in its constitutional sense than do the rules of court which permit a judge to require an attorney (whether he represents Smith Act defendants or the government or any other litigant) to take his seat in a courtroom, and to refrain from further statement. An attorney, acting as such during the trial of a case, must be subject to certain restrictions upon what he may say or do. To that extent he has lost a certain freedom of speech, and a certain freedom of conduct. To that extent such loss of freedom is a necessary adjunct to the intelligent and orderly enforcement of all litigants' constitutional rights, including those clients the disciplined attorney represents. The attorney need not give up his [fol. 589] complete freedom if he prefers not to act as an officer of the court in the trial of a case. When he purports to so act, whether through preference or in response to duty, unless he is to be bound by the reasonable rules of the court governing all cases tried therein, he advocates that anarchy should rule.

I concur in the affirmance.

POPE, Circuit Judge, with whom HAMLEY, C.J. concurs, dissenting.

I have a very different view of what the facts are in this case. The majority accept the conclusion of the Hawaii court that appellant "engaged and participated in a wilful oral attack upon the administration of justice in and by the said United States District Court for the District of Hawaii and by direct statement and implication impugned the integrity of the judge presiding therein and in the said pending case, ..."[1] I am satisfied that there is nothing in

[1] The paragraph in full reads as follows: "Upon its finding and conclusion as stated, supra, this court deems that in saying what she did in her speech to a public gathering at Honokaa, Hawaii, on December 14, 1952, as aforesaid, when there was then pending in the United States District Court for the District of Hawaii a case under the Smith Act, to-wit, the case entitled 'United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et als., Defen-

the record to support that statement. I think this is one case in which it is peculiarly important that we scrutinize with care the proof as to just what did happen.

If appellant used the precise words and made the exact statements that those who testified against her say she did, [fol. 590] there is a serious and substantial question as to whether the judgment below does not violate her rights under the First Amendment. This is no ordinary case. It is the case of one who has a record of defending persons accused of crime, of representing unpopular labor unions, and of even going so far as to appear for Smith Act defendants. I cannot overlook as a judge what I know as an ordinary citizen in common with every one else, that many persons think that one who would handle such cases as has the appellant ought to be disbarred just on general principles. And when the Supreme Court of Hawaii arrives at a conclusion couched in the language just quoted, which finds no counterpart in any word or statement in the record, I consider it my duty to inquire with care whether such statement really represents the facts of the case.

That we are not limited in our examination of the facts is plain since the Supreme Court heard no testimony but heard the case solely upon the written record and "made its own evaluation thereof" "unprejudiced by the report of the legal ethics committee." Our duty, as a federal court, to find the facts for ourselves in the process of determining whether appellant's claim of a federal right under the Constitution, has been frustrated by erroneous conclusions of the Territorial Court, is recognized by the Supreme Court of the United States. That Court, when reviewing a state court

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dants,' being criminal number 10,495 in said court, she engaged and participated in a wilful oral attack upon the administration of justice in and by the said United States District Court for the District of Hawaii and by direct statement and implication impugned the integrity of the judge presiding therein and in the said pending case, within the territorial boundaries of the Territory of Hawaii, and thus tended to also create disrespect for the courts of justice and judicial officers generally, contra to the obligations and duties assumed, as incident to the license, by her and by every person to whom a license has or shall have been issued by this court to practice in the courts of the Territory of Hawaii. She has thus committed what this court considers gross misconduct."

decision under circumstances similar to those here, insists on finding the facts on which the constitutional right turns, for itself. As stated in Stein v. People of State of New York, 346 U.S. 156, 181: "Of course, this Court cannot allow itself to be completely bound by the state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding." [2]

Our power to review decisions of the Supreme Court of Hawaii is substantially the same as that exercised by the Supreme Court of the United States in reviewing final deci- [fol. 591] sions of the highest courts of the states.[3] At least ever since Kansas City So. Ry. Co. v. Albers Comm. Co., 223 U.S. 573, that Court has stated the rule as follows: "In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. (cases cited) Another class of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the question to analyze the facts." Truax v. Corrigan, 257 U.S. 312, 324-325. This rule has been announced on numer-

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[2] "But the prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have." Brown v. Allen, 344 U.S. 443, 500.

[3] Cf. Prensa Insular de Puerto Rico v. People of Puerto Rico, 1 Cir., 189 F.2d 1019, 1021, which examines the history of the same jurisdictional Act.

ous subsequent occasions.[4] It is an everyday practice in the review, by the Supreme Court, of state court decisions. Thus in Schware v. Board of Bar Examiners, 353 U.S. 232, where Schware claimed he had been denied a constitutional right, the Court examined the facts for itself, and at great length, and posed the matter for its decision as follows, (p. 239): "Therefore the question is whether the Supreme Court of New Mexico on the record before us could reasonably find that he had not shown good moral character." It concluded, (p. 246): "There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law." Hence, it was held, the state had deprived him of due process of law.[5] Other cases in which the Supreme Court, in considering claims of infringement of constitutional rights, found the facts for itself are Fikes v. Alabama, 352 U.S. 191; Leyra v. Denno, 347 U.S. [fol. 592] 556; Konigsberg v. State Bar, 353 U.S. 252; and Moore v. Michigan, 355 U.S. 155.[6]

When the facts of this case are thus examined, it should be readily apparent that they do not justify or warrant the conclusion of the Hawaii court above quoted. To assert, as did that court, that the remarks made by appellant, either as charged in the complaint against her, or as shown by the evi-

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[4] Such, for example, as Drivers Union v. Meadowmoor Co., 312 U.S. 287, 293; and Fiske v. Kansas, 274 U.S. 380, 385.

[5] The concurring opinion, rejecting the state court's finding that petitioner was "a person of questionable character", called it "so dogmatic an inference as to be wholly unwarranted." (p. 251)

[6] Cf. also, Lambert v. California, 355 U.S. 225, where it was held conviction under an ordinance was a violation of due process in view of the fact, which the Supreme Court found, that petitioner had no knowledge of the requirements of the ordinance. Another recent case which shows the same approach where there was a claimed denial of the right of free speech, is Staub v. City of Baxley, 355 U.S. 313, 318. The question was the sufficiency of the pleadings to present the point in the state court. It was asserted this was a question of local procedural law. The court held: "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; . . . and the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

dence when taken most strongly against her, was a "wilful oral attack upon the administration of justice in . . . the said United States District Court", and that she "by direct statement and implication impugned the integrity of the judge presiding therein", is, it seems to me, to use the language of Mr. Justice Frankfurter in the Schware case, supra, so dogmatic an inference as to be wholly unwarranted, and so arbitrary as to be offensive to due process. Wieman v. Updegraff, 344 U.S. 183, 192; Slochower v. Board of Education, 350 U.S. 551, 559.

I shall discuss, infra, the question whether, even if appellant had made an attack upon Judge Wiig, she exceeded the bounds of an attorney's certain right to criticize a court or judge. But that question is a hypothetical one, for, as I shall show, appellant did not attack the court or the judge. I shall first proceed to show what the record states she did say; and when the facts of the case are viewed as they really are, it becomes manifest that the order of suspension is not only arbitrary and a denial of due process, but an unjustifiable infringement upon appellant's right of free speech under the First Amendment.

[fol. 593] The most complete and most nearly contemporaneous account of just what appellant did say at the Honokaa meeting is found in the notes made by a newspaper reporter who attended the meeting and the following day wrote a newspaper account of it. A week later he was asked by his editor to transcribe his original handwritten notes and he did so filling them out and making them understandable to the reader.[7] While appellant denies making some of the statements found in the notes, for the purposes of this opinion I take the version shown by the notes. The majority opinion, for the purpose of indicating what happened at the meeting, quotes the newspaper account on the ground that the Hawaii court accepted that as accurate. The reporter, at the hearing, some two years after the speech was made, did not testify that the newspaper story was an accurate statement of what transpired.

[7] The original handwritten notes, taken at the meeting, had been given to the FBI by the reporter. They were not produced and the record shows no serious effort by the Bar Committee to obtain them.

He merely stated that he wrote the story "based upon the notes . . . made during the speech." My objection to its use is not because it is mere hearsay, but it could furnish an excuse for not examining the facts. No one can claim to know what this case is about unless he has read, with care, the full notes of the speech made by the newspaper reporter. They appear as Exhibit B attached to Judge Chambers' opinion.

The newspaper account gives no support to the Hawaii court's conclusions. But in arriving at the facts here it should be noted that the story is distorted, for the reporter has selected, as no doubt most reporters would do, only the most startling portions of the speech,—the parts containing the best headline material.

But when all the notes are read, an unmistakable picture of just what kind of speech was made, and what it was about, clearly emerges. What we have here is an attack on the methods used in all Smith Act prosecutions, including the one then pending, and hence, implicitly an attack on the Smith Act itself. The notes show exactly what appellant talked about. It was as follows: (a) Men in power are trying to put men in jail for what they think and what they read; (b) the prosecutions are for conspiracy—when the Government charges conspiracy, it has [fol. 594] no case—"conspiracy means to charge a lot of people for agreeing to do something you have never done"; (c) The FBI's special agents, widely publicized as wonderful, spend their time investigating people's minds, while hundreds of tax frauds go unprosecuted; (d) Among the agents so used were Paul Crouch and Johnson;[8] Crouch testified what he was told by generals when he was "galloping over the plains of Russia" at a time when one of the defendants was four years old, while Johnson testified he carried some Communist books from San Francisco to Honolulu, in a duffle bag, and showed the bag to Jack Hall; (e) On the strength of this the Government "for two days reads from books supposed to have been in the duffle bag . . . so jack hall violated the smith act because he saw a duffle bag with some books on overthrowing the government

[8] The Fujimoto record indicates this was not Manning Johnson but a Henry Johnson.

in it. its silly;" (f) Crouch testified to things he couldn't possibly remember. Yet they use this kind of testimony. (g) "Some of the witnesses testified differently from what they testified previously." (h) "witnesses testify what government tells them to"; (i) "they will do anything and everything necessary to convict"; (j) "the government has carried on a barage of propaganda" and "expects people in the jury to have hysteria just hearing about communism is enough to jail"; (k) an account of a Sears Roebuck employee who knew Hall. When he refused to testify against Hall the FBI asked his employer to fire him,—when he was not fired they went to the Los Angeles and Chicago offices of the employer and convinced them he had to be fired; (l) "the government gets away with it by making people fear that if they don't do as it wants they'll be branded red and lose their jobs, there's no such thing as a fair trial in a smith act case. All rules of evidence have to be scrapped or the government can't make a case"; (m) in the Palakiko-Majors case[9] the court would not let a woman testify she heard a police officer say he beat the prisoner, because the officer was absent and had no chance to deny it, yet the judge permitted Crouch "to testify about 27 years ago. what was said then", at a time "when the defendant was 5 years old." (n) there's no fair trial [fol. 595] in the case. they just make up the rules as they go along"; (o) A reference to the New York Smith Act case: "the government can't make a case if it tells just what they did so they widened the rules and tell . . . everything including the kitchen sink"; (p) "unless we stop the smith trial in its tracks here there will be a new crime. people will be charged with knowing what is included in books. ideas." (q) "mentioned los angeles trial in which someone said there was no evidence that someone had instructed persons not to read some books"; (r) "there'll come a time when the only thing to do is to keep your children from learning how to read. then not only will unions be destroyed but so will freedom of thoughts and action. there'll be dark ages of thought control when people won't be able to speak freely in taverns and other places"; (s) "urged

[9] See Palakiko v. Harper, 9 Cir., 209 F.2d 75.

audience to . . . explain what a vicious thing the smith act is. people are tried for books written years ago."

The most interesting thing about this near-contemporaneous record of the speech is that it is devoid of any attack upon Judge Wiig or his court. The only reference to the judge was the criticism of his ruling (item "m" above) on the admission of the Crouch testimony. But this was no attack on his integrity. Aside from this the judge was not even referred to. His name was not mentioned. These notes of the reporter are of special importance here, not merely because they were made when his memory was fresh, but also because, as I shall shortly show, they were confirmed by the other witnesses who testified. In short, the notes are a fair summary of all the evidence.

This record does not warrant a conclusion that the integrity of Judge Wiig was attacked. Everything in it is consistent with appellant's position that the speech was directed at Smith Act prosecutions and the Smith Act, and not at Judge Wiig personally. Some of the remarks quoted in the notes she denied making, but I assume for the purposes of this opinion she made all of them, just as the notes show.

Take the statement about "some rather shocking and horrible things that go on at the trial." Have a look at the notes. This remark is made at the beginning, obviously by way of introduction of what she proposed to tell as she went along. The meaning is plain: I am about to tell you [fol. 596] some rather shocking and horrible things that go on. What these "horrible and shocking things" were she specified in detail, extending the itemization to Smith Act trials generally. These were: the use of conspiracy counts; the use of such witnesses as Crouch and Johnson; the use of such "silly" testimony as that given by them; the Government's knowing use of witnesses whose testimony was contrary to that previously given; the Government's propaganda intended to give juries hysteria. Nowhere is there any "shocking and horrible" thing charged to the judge—the specific acts recounted are charged to the Government; to its means of prosecution, and to the Smith Act itself. No witness testified that in this connection, or at any place in the speech, was there any mention made of Judge Wiig.

The Hawaii court wholly failed to consider the context in which the "shocking and horrible" words were used. Its opinion lumps these words with other supposed quotations from the speech, wholly without any attempt to analyze the phrase as the opening of a 30 minute speech. As quoted by the court, appellant said "that a fair trial was impossible." On such truncated quotation it is sought to show that this was a remark limited to the Fujimoto case alone, rather than addressed to Smith Act trials generally, as appellant testified. The notes, read in their entirety, as well as the other testimony, fully disclose that she was discussing all Smith Act cases.

The notes show she said: "There's no such thing as a fair trial in a Smith Act case." After contrasting the exclusion of hearsay in the Palakiko case with the use of Crouch's testimony about what happened 27 years ago, she continued "There's no fair trial in the case. They just make up the rules as they go along." That by this she was still referring to all Smith Act cases is apparent, for she proceeded immediately to illustrate this by describing how this was done in the New York Smith Act case in 1949, with her reference to "everything including the kitchen sink." These were not different speeches—all occurred in the same 30 minutes. No part may fairly be read out of context.

John D. Morse, a witness called by the prosecutors, who was Industrial Relations Director of Honokaa Sugar Com- [fol. 597] pany, testified as follows: "Q. Mr. Morse, do you remember Mrs. Bouslog making any statement as to whether there was such a thing or not as a fair trial in the Smith Act case? A. I remember her saying there was not such a thing as a fair trial in a Smith Act case. Q. And do you remember whether she referred to the conduct and manner in which it was being handled? A. Well, it tied in, I figured it, tied in with any Smith Act case, whether in Honolulu, New York, or whatever it was; that is the impression I got from what she said."

The next mistake in the Hawaii court's statement is its recital that she said "that all of the rules of evidence *were being scrapped* so the government could make *its case.*" (Emphasis mine) So worded it seems to refer exclusively to what was *presently* going on in Honolulu. But the notes

have her saying, immediately following a reference to any Smith Act case: "All rules of evidence *have to be scrapped* or the government can't make *a case.*" (Emphasis mine)

This remark, too, when read in context, clearly was not directed against the judge. As the notes show, it was immediately followed by her illustration of the distinction between other trials and conspiracy trials by reference to the Palakiko habeas corpus case where hearsay was excluded contrasted with the present conspiracy trial where "they permit a witness to tell what was said when a defendant was five years old." This is the same idea she expressed in her reference to the New York trial. A large part of the talk was devoted to her claim of the excessive breadth of conspiracy trial evidence. As appellant explained to Judge Wiig, this remark about rules of evidence having to be scrapped, referred to the use of declarations of third persons in conspiracy cases. There is no proof whatever that it was used otherwise. And the prosecution witness Ferreira testified: "Q. Just tell the Committee to the best of your recollection what Mrs. Bouslog said. A. She started off telling us about the Smith Act trial; that there was no fair trial in the Smith Act case; that the government—I mean, they made up their rules as they went along in Smith Act trial, and she compared the Majors-Palakiko case with the Smith Act trial, and she also stated that in the Smith Act trial they tried you on a conspiracy, and 'conspiracy' was explained to us, not the exact wording, but was something that they tried you for, for your [fol. 598] thoughts; in other words, something that some people think, or you might think of, or this person might think of doing some day, but never actually did, but that is how she explained it on this conspiracy."

The final statement listed in the Hawaii court's opinion is that referring to "stopping the Smith trial in its tracks." Taking it as it appears in the notes, and disregarding a slight inaccuracy in the court's version, she said: "Unless we stop the Smith trial in its tracks here there will be a new crime. People will be charged with knowing what is included in books. Ideas." Just what this statement, so recorded by the reporter, meant, is not explained by any proof offered by the prosecutor. The one thing clear about

it is that it could have no reference to Judge Wiig. On the face of these exact words I would think stopping the Smith trial in its tracks would mean getting a verdict of acquittal. Or it might mean what actually happened to the case. See Fujimoto v. United States, 251 Fed. 2d 342 (Jan. 16, 1958). Appellant herself gave me an explanation. Denying these were the exact words, she said: "I did state in substance something that is reminiscent of that. I said that the Smith Act—continued prosecutions under the Smith Act can lead to a new crime of reading and thought control, and I quoted, as I told Judge Wiig—I quoted the exact language of the prosecutor in the Smith Act trial in Los Angeles, where he had said that all the defendants did was ask people to read, read, read, and they never told people not to read anything. And I said that I felt that the Smith Act would be repealed as soon as people understood what the Smith Act was."

No other witness testified as to this statement. But the reporter's notes tend to confirm her explanation for they show the remark was followed by the reference to reading made in the Los Angeles trial. The confirmatory value of those notes is particularly striking since just two days after the speech, and nearly a week before the notes were typed, and when appellant could not have known what was in them, she gave precisely the same explanation to Judge Wiig. Whether her explanation that she was advocating repeal of the Smith Act be accepted or not, there is no proof whatever that it had any more serious import.

[fol. 599] As a final step in analizing the evidence I allude to a statement which is not listed in the complaint or the opinion, but which appellee seems to think tends to show appellant was directing her talk against Judge Wiig. This is the statement "They just make up the rules as they go along." The use of the pronoun "they" is clear enough. It is in the reporter's notes. All the witnesses who referred to this statement said "they", or "the Government" in connection with the phrase. That this "they" referred to the Government is clear from the whole context. Previous to this phrase, the notes show appellant was throughout talking of the Government. The *Government* "when it hasn't got enough evidence it lumps a number together";

"the *government* does not say advocated overthrow but says they agreed to"; "the *government* goes on with testimony for two weeks on what crouch did"; "the *prosecution* says crouch did this and that"; *Government* propaganda has been going on "the *government* says there was an agreement to violate smith act"; as to witnesses telling conflicting stories, "the *government* knows this but deliberately goes ahead"; "witnesses testify what *government* tells them to"; "then the *government* for two days reads from books"; "the *government* has carried on a barrage of propaganda"; "the *government* gets away with it by making people fear". When all this is followed by "They just make up the rules as they go along", it is absurd to say that appellant was now including the judge in the "they". Appellee argues that as a matter of course it is the judge who makes the rules. The trouble with this is that the evidence does not show she made any such statement. And its improbability appears from the fact that when the speech was made Judge Wiig was still reserving ruling on much of the evidence. All significant rulings were made by Judge Wiig late in the case and long after the speech.[9a]

A proceeding of this kind cannot be founded upon such dubious evidence;—a judgment of disbarment or sus- [fol. 600] pension[10] cannot be supported by that kind of proof. The power to order disbarment "is one that ought always to be exercised with great caution; and ought never to be exercised except in clear cases of misconduct, which affect the standing and character of the party as an attorney." Ex Parte Wall, 107 U.S. 265, 288. See accord, In Re Spicer, 6 Cir., 126 F. 2d 288, 289. "It is settled that charges of unprofessional conduct on the part of an attorney should be sustained by convincing proof and to a reasonable certainty and that any reasonable doubts should be resolved in favor of the accused." Brawner v. State

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[9a] This I develop later. See text opposite footnote 19 infra.

[10] Appellant claims that in her case suspension means the same as disbarment, since Rule 15 (d) of the Territorial Supreme Court, adopted October 3, 1955, requires a lawyer once suspended to start all over, proving his worthy character, and passing a new bar examination. Apart from that I see no difference, for the purposes of this case, between a disbarment and a suspension.

Bar of California, 48 Cal. 2d 814, 313 P. 2d 1, 3. This requirement of clear proof is insisted upon by the courts generally.[11]

In my view there can be no other conclusion here than that the appellant's speech was an attack upon the Government's method of procedure in Smith Act cases including the one then on trial at Honolulu; and an attack upon the Smith Act generally.[12]

Upon these facts it is impossible to avoid the conclusion that what appellant had to say did not overstep the limits of that freedom of speech guaranteed by the First Amendment. As I shall hereafter demonstrate, her right to discuss and criticize the mode of prosecution of Smith Act cases extended not only to cases previously tried, but to the pending case as well. That the Honolulu case was still pending made no difference whatever, as Bridges v. California, 314 U.S. 252, and the cases which followed it, discussed hereafter, abundantly show.

Why appellant chose to make such a speech to that audience and at such a time and place is difficult to comprehend. [fol. 601] It seems probable that few, if any, of her audience had any understanding of what she was saying, and it cannot be believed that she thought any one present could do anything about repealing the Smith Act. I assume that the Union, under whose auspices the meeting was held, was being urged to help in the defense. Its Regional Director, Hall, was one of the defendants. A report to the union on the progress of the trial, which had just begun, would of

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[11] The cases are collected in 7 C.J.S. "Attorney and Client", §33, pp. 784-785.

[12] So far as her attack on the Smith Act is concerned, it is of interest that she could not have foreseen that if she would but hold her fire, she might have saved herself some trouble. Her timing was poor. The decision in the Yates case, 354 U.S. 298, if we take the words of Judge Chambers for it, left that Act "a virtual shambles". Fujimoto v. United States, 9 Cir., 251 F.2d 342 (Jan. 16, 1958). At any rate, her clients went free. (Of course the majority of the court who sat with Judge Chambers did not concur in his statement that the Act was a shambles. Nor would I. All Yates did was to show that the Act punished only incitement to action, and not mere advocacy of doctrine.)

course be in order; and a simple appeal for funds should serve to secure financial aid, if that were her purpose. But this particular speech, which, in view of the temper of the times was bound to cause her trouble, must have been undertaken, I think, primarily as a means of expressing a bitter resentment at what she thought were monstrous injustices.

But whether I can find reason for that speech, and my own disagreement with it are wholly irrelevant. In the words of Judge Pound: "Although the defendant may be the worst of men . . . the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected." [13] That speech is unreasonable, exaggerated, and offensive, does not deny it freedom. Speaking for the Court in Cantwell v. Connecticut, 310 U.S. 296, 310, where the words of the defendant were especially outrageous, Mr. Justice Roberts said: "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." [14]

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[13] People v. Gitlow, 234 N.Y. 132, 158.

[14] In Near v. Minnesota, 283 U.S. 697, Chief Justice Hughes made the same point by quoting from Madison. (p. 718) "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the

[fol. 602] Freedom of speech is not absolute. It may be limited where the facts show a "clear and present danger." [15] But most assuredly freedom of speech does not mean freedom of speech that is true, or sound, or reasonable. It means freedom of speech, period. Freedom means nothing unless it includes freedom for those we hate.[16] Freedom of speech is only a delusion unless it means freedom for others to express what we detest. Though a speech "stirred people to anger, invited public dispute, or brought about a condition of unrest," punishment for making it violates the First Amendment. Terminello v. Chicago, 337 U.S. 1, 5. "For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." Bridges v. California, supra, p. 263. In its broad scope it draws no line, it does not exclude lawyers, or even lawyers who represent the ILWU or persons claimed to be Communists.

In thus making an attack upon the Department of Justice,—"the Government"—for the manner in which it was [fol. 603] prosecuting Smith Act cases, appellant listed many items of grievance. She criticized the use of the

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lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had 'Sedition Acts' forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?"

[15] Schenck v. United States, 249 U.S. 47, 52.

[16] Cf. Girouard v. United States, 328 U.S. 61, 68, quoting Mr. Justice Holmes in the Schwimmer case, (279 U.S. pp. 654-55): "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."

conspiracy technique;[17] she criticized the use of "agents of FBI" generally, and of Crouch and Johnson in particular; she criticized the use of the Government's "barrage of propaganda", and charged the FBI with pressuring Sears Roebuck to "fire" a man because he would not testify against one of the defendants. She charged that the prosecution would "do anything and everything necessary to convict"; that "witnesses testify what the Government tells them to". She urged her audience to tell "what a vicious thing" the Smith Act is. "People are tried for books written years ago."

As I read the newspaper reporter's notes of the speech it seems to me that the prime subject of her speech was Crouch, and other Government witnesses. She alluded to her Honolulu Labor Day speech in which she had discussed professional witnesses, former Communists now paid by the Government. She did not otherwise identify Crouch.[18] The fact that appellant's principal complaints related to the use of Crouch and to his testimony, and similar testimony of other witnesses, sharpens up the point that there was no attack on Judge Wiig. The record in the Fujimoto case is here and is available to us. Latta v. Western Inv. Co., 9 cir., 173 F. 2d 99, 103; United States v. Pink, 315 U.S. 203, 216. Judge Wiig did not rule upon Crouch's testimony until long after the speech, indeed, nearly three months later. Then, on March 10, the court ruled on motions to strike this and other testimony which had been received subject to motion to strike. (Some of Crouch's testimony was then stricken along with that of some others.)[19]

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[17] A classic discussion of that subject is that of Mr. Justice Jackson in Krulewitch v. United States, 336 U.S. 440, 445.

[18] He was the Paul Crouch, who with Manning Johnson and Matusow, were described in Communist Party v. Control Board, 351 U.S. 115, as "three perjurious witnesses."

[19] The record there shows that the Government's case was built largely around Crouch and his testimony. He was the lead-off witness. He was on the stand from November 12 through November 24, and his testimony covers 962 pages. As the Government briefs in that case show, the case was based upon the theory of Marxism-

[fol. 604] One cannot fairly find in this speech any attack upon the integrity of the judge. Proof of any such thing is completely wanting. There is not a scintilla of evidence to that effect,—far less the "clear and convincing evidence" which such a case requires.

When it is recognized that there was no attack on the integrity of the judge, the whole case collapses. Stripped down to its actual facts the judgment of the Hawaii court means no more and no less than that for such an attack on the Department of Justice, an attorney may be disciplined by suspension from practice. True, the court below never got down to stating the proposition in those simple terms. Its faulty findings were masked with generalities like "attack upon the administration of justice", and "disrespect for the courts." Surely no one argues that a lawyer may be disbarred for an attack upon the Department of Justice.

The freedom of speech of the First Amendment is a peculiarly American concept. Historians have shown,[20] and the Supreme Court has held that this amendment was not, like some other provisions of the Bill of Rights, a mere adoption of rules deeply rooted in English common law at the time of the Constitution. "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the

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Leninism. The briefs emphasize the importance attached to proof of that theory by the prosecution. Crouch was the witness on whom they depended for this proof. He testified as an expert on the Communist Revolution and the theory of the Communist Conspiracy, the Comintern, the Red Army, and Red Army materials. According to the witness he himself was on an executive committee of the Communist International to draw up a plan for infiltration of the armies of the capitalist countries. The witness testified he arrived in the Soviet Union in 1927. He was asked: "Q. And while you were in Russia, what did you do and did you meet any person?" When this was objected to, upon Government counsel's statement that he would later "tie the testimony in" the witness was allowed to proceed subject to motions to strike.

[20] Zecharish Chaffee, Jr., "Free Speech in the United States", Chap. 1.

people of Great Britain had ever enjoyed." Bridges v. California, supra, p. 265.[21]

[fol. 605] And this amendment is not only first in number but first in importance of those ten amendments. Cut off freedom of speech, or of the press, and you stop the very lifeblood of a democracy which may live and function only if knowledge and opportunity for discussion are available to all. As Madison said: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." [22] In United States v. CIO, 335 U.S. 106, 129, 144, Mr. Justice Rutledge, speaking for himself and three other justices concurring, said: "The most complete exercise of those [First Amendment] rights is essential to the full, fair and untrammeled operation of the electoral process. To the extent they are curtailed the electorate is deprived of information, knowledge and opinion vital to its function."

Another reason why attacks on the freedom of an individual to speak must be struck down is the way in which the consequence of a single failure to respect that right may spread, like a mantle of fear, over the whole nation. Suspending one person like Harriet Bouslog Sawyer from the practice for one year is not merely the imposition of punishment on her. In upholding this judgment this court serves notice on all lawyers everywhere to hold their tongues, to watch their speech, lest some court hold criticism of a state or federal prosecutor's procedures be ground for disbarment. The very thought that such a proceeding as this might be started would be enough to dry up criticism of government prosecutions no matter what abuses may exist. That is why this freedom is of the very essence of liberty. Let the courts tolerate one single instance of punishment for exercising freedom of speech, and all who heard of it, if they be

[21] The Court quoted (p. 264) Madison's statement that "The state of the press . . . under the common law, cannot . . . be the standard of its freedom in the United States."

[22] Letter to W. T. Barry, August 4, 1822.

men of caution, will instantly cease to be free. "When you put the hotheads in jail, these cooler people do not get arrested—they just keep quiet. And so we lose things they could tell us, which would be very advantageous for the future course of the nation. Once the prosecutions begin, then the hush-hush begins too. Discussion becomes one-[fol. 606] sided and artificial. Questions that need to be threshed out do not get threshed out." Chaffee, supra, loc. cit. 561.

Infringement of freedom of speech destroys thought itself. Instead of inquiring:—"Are these the facts?" "Do I believe this?" we would be asking: "If I think this way, and say so, will I be considered 'controversial', or 'disloyal', or 'subversive'? Will it cause me trouble?" In his recent Reith Lectures at Oxford University George Kennan noted the Russians' "systematic abuse of the human intellect"; "the fact is that the Soviet leaders are the first and leading victims of the abuses they have practiced so long on the freedom of the mind."

The contention here is that appellant cannot claim to be in the position of an ordinary critic of the Department of Justice, for in attacking what went on in Judge Wiig's court she necessarily included the judge for he must have permitted it. Evidence criticized, if is said, was necessarily that which the judge admitted. Furthermore, goes the argument, appellant was violently attacking proceedings in a case in which she was counsel. She was trying her case in a public meeting, with a view to influencing the outcome, and this, it is said, is a violation of a lawyer's professional obligation. This position, I think, will not bear analysis.

In the first place, if we examine what appellant was really saying, it is clear that there was no charging of Judge Wiig with these things. To say she must have been blaming Judge Wiig for Crouch being a witness, or for his testimony is not correct. Of course no one could think the judge selects the witnesses, or thinks up what they shall be asked. The use of the conspiracy form of indictment was, as anyone would know, something chargeable only to the prosecution. I have previously noted, supra, (text opposite note 19), that the important rulings on the admission of testimony came

long after the date of this speech;—they certainly were not included in the condemnations of the talk.

But even if rulings admitting evidence, and other rulings on points of law had been the subject of appellant's attack, nothing is more plain, I think than that courts are properly subject to such criticism, and freedom of speech in that [fol. 607] direction is within the First Amendment protection. While Mr. Justice Frankfurter, in his opinion in Bridges v. California, 314 U.S. 252, 284, was dissenting, yet it is clear the whole Court would approve his statement: "Of course freedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power. Particularly should this freedom be employed in comment upon the work of courts, who are without many influences ordinarily making for humor and humility, twin antidotes to the corrosion of power." And he quoted in a footnote from a speech by Mr. Justice Brewer, (p. 289): "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgment subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death."

Suppose appellant had said: "They produce these witnesses like Crouch, and he testifies to what somebody said when Aileen Fujimoto was only four years old," and then added: "and Judge Wiig lets them do it." We must remember that the test of judicial or legislative power to restrict freedom of speech is the "clear and present danger" standard. The notion that even a direct reference to Judge Wiig, such as that in the supposititious statement I have just assumed, could be a clear and present danger to the fair administration of justice in Judge Wiig's court is manifestly absurd. Such restrictions on appellant's right to speak as were imposed by this judgment are subject to the condemnatory language of the court in Bridges v. California, supra,

(p. 270): "If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert. The substantive evil here sought to be averted has been variously described below. It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American pub-
[fol. 608] lic opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect. . . . We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment." Then, after discussing the language used in the statements there involved, the Court concluded, (p. 278): "The words of Mr. Justice Holmes, spoken in reference to very different facts, seem entirely applicable here: 'I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words.'"

The same test was applied in Pennekamp v. Florida, 328 U.S. 331, 348, and Craig v. Harney, 331 U.S. 367, 376. In the latter case, the Court, speaking of the Constitutional limits on the power of a court to punish for contempt, said: "This was strong language, intemperate language, and, we assume, an unfair criticism. But a judge may not hold in contempt one who ventures to publish anything that tends to make him unpopular or to belittle him. . . . ' . . . The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil. . . . But

the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate. Conceivably a campaign could be so managed and so aimed at the sensibilities of a particular judge and the matter pending before him as to cross the forbidden line. But the episodes we have here do not fall in that category. Nor can we assume that the trial judge was not a man of fortitude."

[fol. 609] The significance of these three cases, (Bridges, Pennekamp, Harney) is that although they dealt with contempt proceedings, the basis of the decision in each case was the constitutional limitation. The same absence of a clear and present danger which voided these contempt orders would make the Hawaii court's judgment in this case a prohibited restriction on free speech even if the speech had expressly included the judge in the supposititious manner indicated. I take it no one will contend that conduct which could not validly be punished as contempt may nevertheless be disciplined by suspension from practice.

The three cases last mentioned also completely dispose of the suggestion that attack may not be made on proceedings in court in a *pending* case. The Supreme Court dealt with that question at length. Of course, the possibility of clear and present danger to the functioning of a court of justice from certain speech or publication could occur if they were directed to pending proceedings.[23] But the facts of this case present no such situation. That a speech in a town of 1000 population,[24] in the island most distant from Honolulu posed a clear and present danger to the administration of justice in Judge Wiig's court, is inconceivable. There is neither finding nor argument to that effect made here.

As for the circumstance that appellant was counsel in that pending case, this is wholly irrelevant. *If* it were not for Cammer v. United States, 350 U.S. 399, and *if* appellant were being proceeded against in the United States District

[23] The language above quoted from Craig v. Harney, supra, is that "conceivably" in a matter pending, a campaign could "cross the forbidden line."

[24] Hammond's World Atlas, 1955 ed., gives Honokaa's population as 1021.

Court for Hawaii for contempt of that court, (she was not, and Cammer says she could not be), then her connection with that case might have meaning. But that it has no significance here even the Hawaii court seems to have recognized, for this circumstance is not even mentioned in its conclusion.[25]

Finally, what of the suggestion that while a newspaper or a layman may criticize prosecuting officers, and attack courts [fol. 610] and judicial officers, yet the constitutional free speech protections do not extend to such actions by a lawyer? I do not here refer to utterances of a lawyer which (a) threaten the judge's person or reputation,[26] or (b) charge that the court or judge has knowingly misused its powers in a particular case,[27] or (c), assert that the judge is corrupt or politically motivated.[28] There is no such case here, as I have shown. Actually Judge Wiig was not even criticized, much less attacked.

But in respect to such criticism, as was here made, no suggestion has ever been made that a lawyer's criticism is any less protected than when made by a layman or a newspaper. Indeed, everything that has been said authoritatively about the First Amendment is to the effect that the rights there granted are universal and all-covering. "For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language read in the context of a liberty-loving society, will allow." Bridges v. California, supra, p. 263.

I think it would be a sad day when a court held that a lawyer has any less right to criticize the Smith Act, or the use of conspiracy indictments, or of professional witnesses, or the results and decisions in the Yates and Dennis cases, than any other person. For the lawyer is, above all other persons, the one best equipped by training to discuss such

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[25] This is the conclusion quoted in footnote 1, supra.

[26] Bradley v. Fisher, 13 Wall. 335.

[27] Duke v. Committee on Grievances, (C.A.D.C.) 82 F.2d 890.

[28] Cobb v. United States, 9 Cir., 172 F. 641.

controversial questions. To say they may be discussed by laymen, but not by lawyers is untenable.

Rather than saying that the right of a lawyer to criticize or attack current judicial procedures is less than that of a layman, there is reason for belief that the lawyer's speaking out on such matters serves a public purpose. Court proceedings, especially criminal proceedings, have an impact on fundamental rights. It is essential that the people be informed on such rights. Lawyers are equipped to discuss them. They know, what Judge Learned Hand has said: "Liberty lies in the hearts of men and women; when it dies [fol. 611] there, no constitution, no law, no court can save it." [29] Professor Thomas Reed Powell has been quoted as saying, "Nine men in Washington cannot hold a nation to ideals which it is determined to betray." [30] I see no way in which it can be held that a President of a Bar Association may discuss these things but persons holding appellant's views may not.

This case bears a striking resemblance to the threatened disbarment in 1938 of one Edward Lamb, a Cleveland lawyer, said to have been a "labor lawyer". While the case never came to trial and was not reported, the part taken in it by the then Solicitor General Robert H. Jackson can be found reflected in a later decision of the Supreme Court to which I shall hereafter allude—a decision of importance here. Lamb, during the trial of a case, and in the courtroom, said directly to the judge: "We were hijacked through this court all day yesterday, and I will tell you now I don't intend to be hijacked all day today." The judge might have punished him for contempt, but did not do so. However, proceedings were brought to disbar him. The Solicitor General came to Lamb's aid, as he concluded from the record Lamb did not deserve disbarment. Jackson was

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[29] Hand, "The Spirit of Liberty."

"In this connection we must remember that the strength of the Constitution is not in the written instrument, nor in the laws enacted to carry it into effect, nor even in the judiciary which interprets and enforces the laws, but in the minds and hearts of the people." Judge John J. Parker, American Bar Association Journal, Jan. 1958.

[30] See Chaffee, Free Speech in the United States, Chap. X.

criticized for going on Lamb's committee. He wrote a letter in reply to that criticism. When the letter was made public the disbarment was dropped. The letter precisely fits the situation here. Mr. Jackson noted that the court had an adequate remedy for any contempt. "For some reason this remedy was abandoned." Then followed the declaration of a rule which the author, as an Associate Justice, later wrote into an opinion: "Mere contempt of court has never been considered cause for disbarment." Mr. Jackson proceeded: "Hot words, even to a judge, do not usually deprive one of his livelihood. If you are familiar with the history of the Bar, many instances of contempt without disbarment will occur to you. Elihu Root and Willard Bartlett were, with [fol. 612] other bar leaders, adjudged to be in contempt of court when they were defending William M. Tweed. No one suggested that either of them should be disbarred. Instead, one became a great leader of the American Bar, and the other became Chief Judge of the New York Court of Appeals.[31]. . . In Lamb's case, however, the Court allowed the time for appropriate remedies for Lamb's contempt to pass, and the Bar Association then proposed disbarment, which would drive Lamb from his profession for life and deprive him of a livelihood. I know of no adequate explanation of this fierce and vindicative proposal except that Lamb is a labor lawyer."

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"You suggest that the defense of Lamb proceeds from a desire to break down the judicial system. This, it seems to me, shows a lack of understanding of the requirements of a judicial system. We can have no worthy judicial system unless we protect the right of advocates to champion the cause of any person who becomes involved in the machinery of the law.

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"I do not expect a breach of conduct which would be passed, generally, with a small fine or an apology to be

[31] These matters were described somewhat more in detail in Mr. Justice Jackson's opinion for four of the members of the Court in In re Isserman, 345 U.S. 286, 290, 293. The four judges were the majority who set aside the disbarment order at 348 U.S. 1.

made the excuse for depriving a labor lawyer of his right to practice his profession, or to deprive labor of a representative who has zeal in its cause, even if the zeal is sometimes misdirected." The full text of the letter is in the margin.[32]

[32] "June 7, 1938

Mr. William R. Daley
Cuyahoga Building
Cleveland, Ohio

Dear Sir:

I have your letter criticizing me for authorizing the use of my name in connection with the protest against the disbarment proceedings involving Edward Lamb. I usually ignore criticism, on the theory that friends require no explanation, enemies will accept none, and others do not care. Since your criticism has been so painstaking as to lead you to read the record in the case, I shall depart from my usual rule.

The language of Lamb to the effect that he had been hijacked and did not intend to be hijacked again is not approved or defended by the committee of which I am a member, as you would see if you had read its statement. Neither do we assume to sit in judgment on the conduct or rulings of the court.

The court had an adequate remedy for any contempt. If I were presiding and was not conscious of having provoked such language, I should hold a counsellor in contempt and fine him appropriately and commit him until it was paid. This would be proportioned to the offense, would be an adequate humiliation to any lawyer, and would vindicate the dignity of the court. For some reason this remedy was abandoned. Timely and fairly used, it would have been no affair of lawyers generally, even if the penalty might seem to them excessive or the offense excusable.

Mere contempt of court has never been considered cause for disbarment. Hot words, even to a judge, do not usually deprive one of his livelihood. If you are familiar with the history of the Bar, many instances of contempt without disbarment will occur to you. Elihu Root and Willard Bartlett were, with other bar leaders, adjudged to be in contempt of court when they were defending William M. Tweed. No one suggested that either of them should be disbarred. Instead, one became a great leader of the American Bar, and the other became Chief Judge of the New York Court of Appeals. Recently in the District of Columbia a lawyer was found guilty of contempt and punished, and immediately thereafter was elected to high office in the American Bar Association. Not long ago a leader of the New York Bar was adjudged in a Federal Court to have been 'studiously contemptuous' even characterizing parts of the court's charge as a 'stump

[fol. 613] In this letter Mr. Jackson suggested that the reason for that proceeding was that Lamb was a labor

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speech.' He paid his fine and no one suggested that disbarment be inflicted or even considered. A government lawyer was fined for contempt in the same case—nor was he deprived of office or of standing at the Bar. Many other instances could be cited.

In Lamb's case, however, the Court allowed the time for appropriate remedies for Lamb's contempt to pass, and the Bar Association then proposed disbarment, which would drive Lamb from his profession for life and deprive him of a livelihood. I know of no adequate explanation of this fierce and vindicative proposal except that Lamb is a labor lawyer. That offensive and habitual activity on behalf of labor is the cause of his prosecution is affirmed by examination of the petition for disbarment with its allusion to 'class hatreds,' and is further confirmed by the reference in your letter to 'corporation baiters.'

This raises an issue wider than the relative proprieties of the lawyer and the judge. I take it that you will grant that in the economic struggle labor is entitled to have its lawyers. If from habitual representation of labor causes they become known as 'corporation baiters,' I know of no reason why they, any more than their counterparts who become exclusively 'corporation lawyers' should be disbarred. I do not think of any specialty in law practice, but I grant the right, and will defend the right, of a lawyer to devote himself to labor representation as his specialty, if he desires.

You suggest that the defense of Lamb proceeds from a desire to break down the judicial system. This, it seems to me, shows a lack of understanding of the requirements of a judicial system. We can have no worthy judicial system unless we protect the right of advocates to champion the cause of any person who becomes involved in the machinery of the law. I know of no group today that needs competent lawyers to defend it in the courts more than labor. May I remind you that of eleven Labor Relations Board cases on which the Supreme Court has passed, seven of them—more than two-thirds of them—the Supreme Court held to have been unlawfully and improperly decided against labor by the lower court judges. The burden of a labor lawyer in our courts is not easy.

My position on the committee is that I shall defend the right of any member of our profession to appear habitually, if he desires, in labor causes, and the right of a man at the bar to become a 'labor lawyer' as well as to be a 'corporation lawyer.' I expect him to pay such penalty as would be exacted from the lawyers on the other side if they were guilty of similar conduct. I do not expect a breach of conduct which would be passed, generally, with a small fine or an apology to be made the excuse for

[fol. 614] lawyer. Appellant here was a labor lawyer.[33] She was also a lawyer for alleged Communists. In alluding to that I do so only for the purpose of suggesting that this circumstance is the reason I feel we should examine the facts with the greatest of caution lest our detestation of Communism obscure our vision. I make no suggestion here similar to the strictures of Mr. Jackson. I feel sure that this proceeding was instituted in good faith.

[fol. 615] But there is one advantage we today have over the prosecutors as they stood in December, 1952. For since that time all of us have learned much about Communism, and that it is a more deadly peril that (sic) we had thought. Now we are learning that the way to fight Communism is not by aping its denial of liberty, or its suppression of freedom of speech. When this proceeding was started a generally held notion of our national peril was epitomized in the cry, "Who promoted Major Peress?" When we thought of Communist we thought only of the neighbor next door whose ideas we did not like . . . But today we know that the real threat comes from a different direction and it is an open one: "We'll bury you!" Free men cannot be buried. But if we insist on chipping away our heritage of liberty and freedom then indeed we shall be in danger of losing the decisive battle,—that for the minds and hearts of men. Mr. Justice Jackson put it well when he said: "I have not been one to discount the Communist evil. But my apprehensions about the security of our form of government are about equally aroused by those

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depriving a labor lawyer of his right to practice his profession, or to deprive labor of a representative who has zeal in its cause, even if the zeal is sometimes misdirected.

I, with the others, will leave no stone unturned to see that this effort does not succeed and to focus public opinion on the effort if it is persisted in.

Sincerely yours,

Robert H. Jackson."

"America's Advocate: Robert H. Jackson", by Eugene C. Gerhart, p. 152.

[33] See Ackerman v. International Longshoremen's & W. Union, 9 Cir., 187 F.2d 860.

who refuse to recognize the dangers of Communism and those who will not see danger in anything else." [34]

THE AFFIDAVIT CONCERNING THE JUROR

The second charge in the complaint relates to appellant's alleged misconduct in interviewing the juror in the Fujimoto case after the verdict had been returned. After alluding to the fact that "it has not been uncommon, if not in fact common practice," for attorneys to interrogate jurors after rendition of verdict by them, and adding that any one who *"hereafter* . . . interrogates one who has been . . . a juror of a trial jury", as to any occurrence in the jury room or as to what may have been persuasive in reaching the verdict "acts at his peril", the court then concluded: "However, in the instant matter, this court will let its hereinbefore expressed disciplinary order—suspending the said respondent licensee from the practice of law in the territorial courts for one year and requiring her to pay costs—suffice, although also deeming gross misconduct her said repeated interviews with and interrogations of David Fuller." (Emphasis mine) I think it is plain that the court [fol. 616] below simply took no action on this charge. Judge Chambers said: "To us, this is a statement that the penalty for the two charges is imposed concurrently—the same penalty for both charges." The court might have said that, but it did not.[35]

Even the majority concede that if the case were to be reversed on the first charge this second one would have to be referred back to the territorial court. It is my view that there is no justification for any such remand or for any order other than a flat reversal and dismissal of the whole proceeding.

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[34] Shaughnessy v. Mezei, 345 U.S. 206, 227, (dissenting opinion).

[35] Convincing proof that the Hawaii court did not think it was passing on the second charge is the fact that Chief Justice Towse signed the opinion. It was his view that his court could not entertain this charge, and that it should be dismissed "as an interference with the administration of justice in the United States District Court for the District of Hawaii and a possible usurpation of the power thereof."

It would be hard to find a more frivolous charge than this second one relating to the affidavit. I shall touch upon that shortly, but first I make inquiry as to whether we may review action of the Hawaii court upon that second charge if we assume that it took any.

A reading of the majority opinion indicates that the court has no doubt of its power to review such a decision for it proceeds to review it at length. I thoroughly agree that we have such power. Our jurisdiction arises under §1293 of Title 28.[36] Most of what I have said heretofore demonstrates that we have here a case of violation of the Constitution. The Court of Appeals for the First Circuit operates under the same jurisdictional statute. It has often held that in a case which presents a federal question, the whole proceeding is reviewable, and the court has jurisdiction to decide "whatever questions of local law may be presented regardless of amounts in controversy." Mercado [fol. 617] Riera v. Mercado Riera, 1 Cir., 152 F. 2d 86, 92.[37] Moreover, this is a case "where the value in controversy exceeds $5000 exclusive of interest and costs." It is shown here, and the fact is not controverted, that one year of appellant's practice has a value to her of more than $5000.[38] That such facts give us jurisdiction was recognized by this court in Whittemore v. Farrington, 234 F. 2d 221. That was a case in which jurisdiction depended upon the

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[36] "1923. Final decisions of Puerto Rico and Hawaii Supreme Courts—The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the Supreme courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs."

[37] "We are not prepared to say that all of these federal questions are colorable and frivolous. Thus regardless of how we decide them, we have jurisdiction under §128 of the Judicial Code, supra, not only to consider them but also to go further and decide whatever questions of local law may be presented regardless of amount in controversy."

[38] This proof was made by affidavit in accordance with Title 28, §2108. See De La Torre v. National City Bank of New York, 110 F.2d 381, 384, approving this procedure.

value in controversy. The court found such jurisdiction was lacking because the most it could discover by way of value was some $1600 which one Edmund Leavy would have lost in trustee's fees. But in its footnote 7, (p. 225) it recognized the general principle applicable here: "For the general principle that the measure of the value in controversy, for purposes of testing the jurisdictional amount, in suits wherein the plaintiff seeks specific relief rather than damages, is the value of such relief to the plaintiff, see Hunt v. New York Cotton Exchange, 205 U.S. 322, . . . In First State Bank v. Chicago, R. I. & P. R. Co., 8 cir., 1933, 63 F. 2d 585, . . . the rule is applied to an action brought to abate other actions."

The same principle is often applied in passing upon the jurisdiction of a United States district court where it is dependent upon amount in controversy. Thus in an injunction suit designed to protect a business or property the necessary amount in controversy may exist notwithstanding there may be no prayer for damages. See Hunt v. New York Cotton Exchange, 205 U.S. 322, 336; Bitterman v. Louisville N. R. Co., 207 U.S. 205, 225; Gibbs v. Buck, 307 U.S. 66. I see no possible excuse for saying that the right to practice law is a privilege which is priceless and beyond value and hence there cannot be a value in controversy. If disbarment is sustained, Mrs. Sawyer will lose more than $5000 and that is all there is to it.

[fol. 618] Appellant cannot be disciplined in the Hawaii court for conduct in connection with a case in the federal court which federal law holds proper. This case bears no resemblance to In Re Isserman, 9 N.J. 269, 87 Atl. 2d 903. In that case, the conduct condemned, besides the rape conviction, was iniquitous no matter where carried on. Here the Supreme Court of Hawaii expressly recognized that interviewing jurors after verdict was common practice for lawyers in Hawaii. Yet if Judge Chambers is right, it proceeded to impose a suspension of practice on appellant for following that common practice, all because of its rule stated to be a guide for counsel "thereafter". But such an order reaches even greater heights of absurdity. It suspends for conduct in connection with a federal case which the federal courts have recognized to be proper.

An able discussion of the propriety of procuring post-verdict affidavits from members of a jury is that of Judge Learned Hand in Jorgensen v. York Ice Machinery Corp., 2 cir., 160 F. 2d 432, 435. That was a case in which the court considered at great length affidavits of jurors presented in support of motions for new trial disclosing the deliberations in the jury room while the case was under submission. The court held that whether a new trial should have been granted was a matter within the judge's discretion, but the court assumed the propriety of procuring the testimony of the jurors as to what happened. Citing Mr. Wigmore's work on Evidence, the court criticized, as does Mr. Wigmore, the oft-quoted statement that jurors may not "impeach their verdict." The court cited McDonald v. Pless, 238 U.S. 264, 268, which discussed the propriety of the use of affidavits of jurors as to what happened in the jury room. That case stated: "Both of those decisions recognize that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'" Clyde Mattox v. United States, 146 U.S. 140, furnishes an instance in which the court held that affidavits of jurors were properly used to show overt acts in the jury room which are accessible to the knowledge of all the jurors.[39]

[fol. 619] Since jurors' affidavits may thus be used on motions for new trial, a lawyer may of course interview the juror for the purpose of procuring the facts and the affidavits; otherwise they would be unobtainable. Of course, it was the appellant here who made the affidavit. That affidavit is subject to the infirmity that it is hearsay. Even so, it would not be inappropriate to furnish such information to the judge; he might wish to pursue the inquiry himself. Cf. Remmer v. United States, 350 U.S. 377. But the appellant is not charged with the offense of presenting hearsay. (If that were an offense the ranks of the legal profession would indeed be decimated.) The impropriety charged here is Mrs. Sawyer's interview with the juror.

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[39] The whole subject of the use of such affidavits by jurors is treated at length by Wigmore, 3d Ed., Vol. 8, §§2352, 2354.

Let it be conceded that if the juror Fuller had sworn to everything that was in appellant's affidavit, his testimony would not have furnished any basis for a new trial. But this is the first time I have ever heard it suggested that an attorney may be suspended from practice for attempting to present evidence of doubtful relevance or competency. The court below is without power to discipline appellant for acts done in a case in a federal court which, under the decisions of the federal courts, she had a right to do.

Suppose appellant had done much worse things. Suppose she had even been guilty of contempt of the court. The rule established by In Re Isserman, 345 U.S. 286, 290, and 348 U.S. 1, is that a lawyer is not subject to suspension or disbarment in any court merely because he has been convicted of contempt.[40]

Under Title 28, §2106, we may direct the entry of such appropriate judgment as may be just under the circumstances. The only appropriate or just judgment here is one dismissing the proceedings.

* * * * * * * *

As is elsewhere apparent, the foregoing part of this opinion was written and circulated prior to the writing of Judge Barnes' concurring opinion. What I have said above sufficiently discloses why my view of the facts differs from that [fol. 620] which he expresses. Assuming that the dissenter normally writes last, I have only one word to add:

I think Judge Barnes in, as it were, dissenting from my dissent, has misunderstood my version of the facts. It will be noted that I said: "In my view there can be no other conclusion here than that the appellant's speech was an attack upon the Government's method of procedure in Smith Act cases including the one then on trial at Honolulu; and an attack upon the Smith Act generally." I did not say or suggest that appellant was not discussing the *pending*

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[40] "We do not recall any previous instance, thought not venturing to assert that there is none, where a lawyer has been disbarred by any court of the United States or of a state merely because he had been convicted of a contempt." (345 U.S. 292) This is the opinion of the four Justices who were the majority at 348 U.S. 1. See footnote 34, supra.

case. This is further plain from the fact that I treated at length, with reference to the Bridges, Pennekamp and Harney cases, the consequences of the appellant's attack relating to a *pending* case. Essentially my point has been that the speech must be read in context, and the context was all Smith Act cases, including this one. I cannot agree that an attack on a pending case is by reason of that fact an attack on the judge who presides in it.

STEPHENS, Chief Judge, dissenting.

I join Judges Pope and Hamley in dissenting to the majority decision of the Court.

[File endorsement omitted]

[fol. 621]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15109

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST HARRIET BOUSLOG SAWYER,

a Member of the Territorial Bar of the Territory of Hawaii.

JUDGMENT—Entered June 9, 1958

Appeal from the Supreme Court of the Territory of Hawaii.

This cause came on to be heard on the transcript of the record from the Supreme Court of the Territory of Hawaii, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and hereby is affirmed.

[File endorsement omitted]

[fol. 622] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 623] [File endorsement omitted]

[fol. 624]

Supplemental Transcript of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15109

In the Matter of HARRIET BOUSLOG SAWYER, also known as HARRIET BOUSLOG, an Attorney at Law, Appellant.

AFFIDAVIT OF APPELLANT AS TO AMOUNT IN CONTROVERSY—
Filed May 10, 1956

Territory of Hawaii)
City and County of Honolulu) SS

Harriet Bouslog Sawyer, being first duly sworn, on oath deposes and says:

She is the appellant in the above entitled proceeding.

The value of her right to practice law in the courts of the Territory of Hawaii greatly exceeds the sum of $5,000.00, exclusive of interests and costs.

Her annual net income since she resumed the practice of law in the Territory of Hawaii in October 1946 until the time of her suspension by the judgment of the court below on April 7, 1956 has always exceeded the sum of $5,000.00, and based upon present cases and litigation her income will continue to exceed said sum.

[fol. 625] The value of her interest in the law partnership of Bouslog & Symonds formed in February, 1948, greatly exceeds the sum of $5,000.00.

/s/ Harriet Bouslog Sawyer

Subscribed and sworn to before me this 8th day of May, 1956.

[Seal][s]

Edward H. Nakamura, Notary Public, First Judicial Circuit, Territory of Hawaii. My commission expires: May 19, 1958.

[fol. 626] Acknowledgment of service (omitted in printing).

[fol. 627]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: DENMAN, Chief Judge; POPE and LEMMON, Circuit Judges.

MINUTE ENTRY OF ORDER OF SUBMISSION—May 21, 1956

Ordered motion of Harriet Bouslog Sawyer for stay pending appeal argued by Mr. A. L. Wirin, and Mr. John T. McTernan, counsel for the Appellant, and by Mr. A. William Barlow, counsel for the Bar Association of the Territory of Hawaii, and submitted to the Court for consideration and decision.

[fol. 628]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,109

In the Matter of HARRIET BOUSLOG SAWYER, also known as HARRIET BOUSLOG, an Attorney at Law, Appellant.

UPON MOTION FOR STAY PENDING APPEAL—May 23, 1956
From the Supreme Court of the Territory of Hawaii.

Before Chief Judge DENMAN, POPE and LEMMON, Circuit Judges.

Per Curiam Opinion Upon Motion for Stay Pending Appeal—May 23, 1956

Appellant, ordered suspended from practicing law for one year by the Supreme Court of the Territory of Hawaii, has appealed to this court and now seeks an order staying the order of suspension pending her appeal here.

Opposing the motion, the Territory, and the Bar Association of Hawaii, which prosecuted the proceedings in the Hawaiian Court, argue that we are without jurisdiction to entertain the appeal.

A justiciable contention is here made that we have jurisdiction, both because there is the requisite value in controversy incidental to the order appealed from,[1] and because appellant asserts the order operates to infringe her rights [fol. 629] under the First Amendment, Cf. Slochower v. Board of Education, 350 U. S. 551.

Without expressing any views as to the merits of the appeal, we deem it a justiciable question whether the right to exercise the privilege of practicing law may be terminated because of statements which are protected as constitutional rights. Cf. Wieman v. Updegraff, 344 U.S. 183. Since appellant "has a fair question to raise as to the existence of such a right", as she claims here, (American Federation of Musicians v. Stein, 6 Cir., 213 F. 2d 679), we may entertain the motion for stay. And since the extent of the discipline ordered is such as to be comparable in severity to imposition of a criminal penalty, we deem it appropriate to apply the principle which underlies the grant of bail pending a criminal appeal. We are of the opinion that the application of the discipline ordered should await the determination of the appeal. The motion for stay pending appeal is granted.

Judge Lemmon dissents and will file his dissent hereafter.

[File endorsement omitted]

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[1] The object of the disciplinary proceedings, and the effect of the order, is to take away a right to practice. The object of appellant's defense is to protect that right. Hence it may be contended that "[t]he right, therefore, is the matter in dispute, and its value to the [appellant] determines the jurisdiction"; Hunt v. N.Y. Cotton Exchange, 205 U.S. 322, 336; and that this value is not less than the earnings for the period involved.

[fol. 630]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,109

In the Matter of HARRIET BOUSLOG SAWYER, also known as HARRIET BOUSLOG, an Attorney at Law, Appellant.

DISSENTING OPINION—May 25, 1956

LEMMON, Circuit Judge (Dissenting).

I find myself unable to agree with my colleagues regarding the proper disposition of this motion.

Our jurisdiction over appeals from final decisions of the Supreme Court of Hawaii is strictly limited by 28 USCA Sec. 1293. That jurisdiction embraces appeals in three types of cases:

1. "Cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder."
2. "Habeas corpus proceedings."
3. "All other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs."

Since this is not a habeas corpus proceeding, we need consider only groups 1 and 3.

1. *This Case Does Not Involve Any Rights Protected by "the Constitution, Laws or Treaties of the United States," etc.*

The right to practice law before a state or territorial court is not protected by the Constitution of the United States. In Bradwell v. Illinois, 1873, 16 Wall. 130, 138-139, the Court said:

> " . . . [counsel] proceeds to argue that admission to the bar of a state, of a person who possesses the req-

> uisite learning and character, is one of those [privileges and immunities] which a state may not deny. [fol. 631] "In this latter proposition we are not able to concur with counsel. We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a state is forbidden to abridge. But the right to admission to practice in the courts of a state is not one of them."

See also In re Lockwood, 1894, 154 U.S. 116, 117; Mitchell v. Greenough, 9 Cir., 1938, 100 F.2d 184, 185, and the cases there cited, certiorari denied, 1939, 306 U.S. 659-660; Emmons v. Smitt, 6 Cir., 1945, 149 F.2d 869, 872, certiorari denied, 1945, 326 U.S. 746.

The very first case cited by the appellant on the subject of "the right to practice law" emphasizes the plenary power of a court to discipline the attorneys who practice before it. In Ex parte A. H. Garland, 1867, 71 U.S. 333, 378-379, Mr. Justice Field used the following language:

> "Attorneys and counsellors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. *They are officers of the court; admitted as such by its order, upon evidence of their possessing sufficient learning and fair private character.* * * * The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. *From its entry the parties become officers of the court and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded.* [Case cited.]" [Emphasis supplied.]

The appellant's own "Motion for Stay Pending Appeal," etc., establishes beyond cavil that "The complaint was referred by the [Supreme Court of the Territory] to its

Legal Ethics Committee, which took testimony and other evidence *in an adversary proceeding* in which appellant [fol. 632] was represented *by counsel and had opportunity to defend.*" [Emphasis supplied.]

I do not think that the case of Slochower v. Board of Higher Education of New York City, 1956, 350 U.S. 551, 553, is in point. There is a sharp difference between the right of a school board summarily to discharge a teacher for "a valid assertion of an admitted constitutional right," and a court to discipline one of its own officers for "gross misconduct."

2. *The Jurisdictional Amount Is Not Present in the Instant Case.*

The appellant has filed an affidavit setting forth that "her annual net income . . . has always exceeded . . . $5,000," and that "The value of her interest in the law partnership of Bouslog & Symonds . . . greatly exceeds" that amount.

But neither the value of the appellant's interest in a law partnership nor the appellant's annual income is the subject matter of the present controversy. We are concerned here with the appellant's right to hold a license and continue in the practice of the law: a right that is priceless, measureless, intangible, and imponderable. It cannot be reduced to the common denominator of the market place. It is surprising that any lawyer should deny this.

In Town of Elgin v. Marshall, 1883, 106 U.S. 578, 580, the Court said:

> "The rule, it is true, is an arbitrary one, as it is based upon a fixed amount, representing pecuniary value and, for that reason, excludes the jurisdiction of this court, in cases which involve rights that, because they are priceless, have no measure in money; [Cases cited] but, as it draws the boundary line of jurisdiction, it is to be construed with strictness and rigor. As jurisdiction cannot be conferred by consent of parties, but must be given by the law, so it ought not to be extended by doubtful constructions."

3. *Conclusion.*

The appellant has been condignly disciplined for misconduct by a court of which she is an officer. She is now [fol. 633] seeking to blow up the chastisement into a Constitutional cause célèbre. I, for one, do not propose to lend myself to any such effort.

I am of the opinion that this appeal should be dismissed, as one of which this Court has no jurisdiction.

[File endorsement omitted]

[fol. 634] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 635]

SUPREME COURT OF THE UNITED STATES

No. 326, October Term, 1958

In the Matter of Disciplinary Proceedings against Harriet Bouslog Sawyer, Petitioner.

ORDER ALLOWING CERTIORARI—November 17, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 29 1958
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1958

No. 326

In the Matter of Disciplinary Proceedings against

HARRIET BOUSLOG SAWYER,

a Member of the Territorial Bar of the Territory of Hawaii,

Petitioner.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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1. In holding that a lawyer, while serving as counsel of record in a pending case, may not publicly comment on that case but is subject to unspecified "restraints not applicable to the public in general" (App. A, p. 18) the court below decided an important federal question which has not been, but should be, settled by this court 14

2. The court below in imposing the limitations on lawyer's speech just noted decided several subsidiary federal questions in a way in conflict with the applicable decisions of this court in that it rejected the clear and present danger test or any standard referable to risks to legitimate ends of government and substituted vague and undefined standards which included subjective evaluation of the listener 17

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3. In affirming the findings of the territorial court that petitioner's speech constituted a wilful attack upon the administration of justice in the District Court and impugned the integrity of the trial judge, the court below decided a federal question in a way in conflict with the applicable decisions of this court and so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision in that the finding is so dogmatic an inference as to be wholly unwarranted and so arbitrary as to be offensive to due process 21

4. The court below sustained the findings of the territorial court that petitioner's interviews of the juror Fuller constituted gross misconduct meriting severe discipline. In this the court below decided an important federal question which has not been, but should be, settled by this court 27

5. In holding that the territorial court had jurisdiction to adjudge the conduct of a federal practitioner before and in relation to a federal court and concerning a case pending in the federal court, the court below decided an important question of federal law pertaining to the proper relations between the territorial courts and the federal courts which has not been, but should be, decided by this court 30

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. .....

In the Matter of Disciplinary Proceedings against

HARRIET BOUSLOG SAWYER,

a Member of the Territorial Bar of the Territory of Hawaii,

Petitioner.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Harriet Bouslog Sawyer respectfully petitions that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit which affirmed a judgment of the Supreme Court of the Territory of Hawaii adjudging petitioner, a lawyer, guilty of gross misconduct and ordering surrender of her license and her suspension from practice for a period of one year.

Opinions Below.

The opinion of the court below is as yet unreported. A copy of the majority, concurring and dissenting opinions[1] is appended to this petition as Appendix A.

The opinion of the Supreme Court of the Territory

[1]After initial submission to the normal three-judge division of the court below, the case was heard *en banc* and the court divided four to three for affirmance.

of Hawaii (herein called the Territorial Court) is reported at 41 Haw. 403. A copy of that opinion is set out in Appendix B to this petition.

Jurisdictional Grounds.

The judgment of the Court of Appeals was made and entered June 9, 1958. Neither rehearing nor extension of time for filing this petition has been requested or ordered.

Jurisdiction of this Court is invoked under 28 U. S. C. 1252(1).

Questions Presented.

1. Whether a lawyer may be disciplined in a manner tantamount to disbarment[2] because of having made public comment concerning a pending case in which he is one of counsel of record

(a) merely because he is counsel of record in the pending case and therefore "under restraints not applicable to the public in general";

(b) without reference to, indeed in rejecting, the clear and present danger rule (see *Bridges v. California*, 314 U. S. 252, 273; *Pennekamp v. Florida*, 328 U. S. 331, 347);

(c) notwithstanding that the comment falls short of utterances which (i) endanger the fair administration of justice or (ii) fail to maintain the respect due the courts as the usual course of decision has defined that term;

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[2] The judgment of the Territorial Court is virtually tantamount to disbarment. For under Rule 15(d) of the Rules of the Territorial Court (App. E, *post*, p. 73) an attorney suspended for more than six months must again, "as though applying for admission to the Bar," satisfy that court both as to good moral character and requisite legal learning.

(d) upon evidence that lacks solid and convincing proof of offending conduct and supports reasonable inferences consistent with innocence.

2. Whether the findings of the Territorial Court, approved by the court below, to the effect that petitioner "engaged and participated in a wilful and oral attack upon the administration of justice in and by the said United States District Court . . . and by direct statement and implication impugned the integrity of the judge presiding therein" rest upon such dogmatic inferences as to be wholly unwarranted and are so arbitrary as to offend due process.

3. Whether in the federal courts it is a disciplinary offense for a lawyer, after verdict, to interview trial jurors concerning matters occurring in their deliberations where the lawyer is investigating remarks of the juror concerning wrongdoing and frameup in connection with the trial and verdict.

4. Whether the judgment of the Territorial Court affirmed by the court below, was beyond the jurisdiction of the former and contrary to sound policy governing relations between territorial courts and federal courts in that it purports to set standards of conduct for an attorney with respect to conduct in a federal court and concerning matters pending therein and inevitably affects the right of that attorney to practice before the federal court.

5. Whether by virtue of the arbitrariness of the findings of the court below and the intrusions upon freedom of expression sanctioned and declared by the court below, there have been fashioned standards of professional conduct that menace the independence of the bar in general and the bar of the federal courts in particular.

Provisions of Constitution, Statutes, Regulations Involved.

The United States Constitution, First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (U. S. C. A., Constitution, p. 46.)

United States Constitution, Fifth Amendment:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ." (U. S. C. A., Constitution, p. 47.)

28 U. S. C., Section 1293:

"The courts of appeal for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii, respectively, in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs."

28 U. S. C., Section 2108:

"Where the power of any court of appeals to review a case depends upon the amount or value in controversy, such amount or value, if not otherwise satisfactorily disclosed upon the record, may be shown and ascertained by the oath of a party to the case or by other competent evidence."

Section 9701, Rev. Laws of Haw. (1945), as amended:

"Section 9701. Qualifications. The Supreme Court shall have the power to examine, admit and reinstate as practitioners in the courts or record such persons of good moral character who are citizens of the United States of America, and who have taken the prescribed oath of office, as it may find qualified for that purpose, but no person shall be examined, admitted or reinstated unless he is qualified under the Hawaiian Organic Act to vote in the Territory of Hawaii and shall have actually registered as such voter; and the Supreme Court shall have the sole power to revoke or suspend the license of any such practitioners or to dismiss or suspend them from the roll of practitioners for malpractice, fraud, deceit or other gross misconduct."

Rule 19, Rules of the Supreme Court of the Territory of Hawaii, as amended October 31, 1953. (39 Haw. 707.) Text set forth in Appendix C.

Rule 19, Rules of the Supreme Court of the Territory of Hawaii, as amended April 21, 1954. (unreported) Text set forth in Appendix D.

Rule 15(d), Rules of the Supreme Court of the Territory of Hawaii (effective October 3, 1955). (40 Haw. 764.) Text set forth in Appendix E.

Rule 1, Rules of Civil Procedure for the United States District Court for the District of Hawaii (as amended and effective March 21, 1955). (unreported) Text set forth in Appendix F.

Statement of the Case.

The Judgment and Its Effect.

The court below affirmed the judgment of the Territorial Court that petitioner "be suspended and prohibited from practice, either directly or indirectly and in any manner whatsoever" for a period of one year.[3] [R. 118.][4] As already indicated this suspension has the effect of disbarment.

The Proceedings in the Territorial Court.

This case originated with a complaint of the Bar Association of Hawaii filed July 8, 1954 [R. 3, 4], alleging unprofessional conduct by reason of (a) things said by petitioner in a speech given at Honokaa, Hawaii, on December 14, 1952 and during the trial of a case entitled *United States v. Fujimoto* in the District Court for the District of Hawaii,[5] she being one of counsel therein, and (b) interviews in late June, 1953, of a juror in that case after verdict.[6]

Following a hearing on the complaint before the Legal Ethics Committee of the Territorial Court, and upon the report of that Committee [R. 14-18] the Territorial Court ordered petitioner to show cause why the findings, conclusions and recommendations of the Committee should not be adopted. The matter was argued and submitted to the Territorial Court upon the record made before the Legal Ethics Committee.

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[3]That judgment was stayed, pending appeal, by the court below.

[4]References in the form R. ..... are to the record printed for the use of the court below.

[5]That cause arose upon an indictment charging conspiracy to violate the Smith Act (18 U. S. C. 2385). The judgments of conviction were later reversed by the court below. (Case No. 13915, unreported.)

[6]The complaint as to the juror episode was amplified by a bill of particulars. [R. 5-13.]

The Evidence and the Findings—the Honokaa Speech.

Petitioner made a speech at the time and place and under the circumstances alleged. The *Fujimoto* case was then at trial in Honolulu before the Honorable Jon Wiig, United States District Court Judge for the District of Hawaii. Honokaa is situated on a different island from Honolulu some 182 miles distant.

It was charged and the Territorial Court found that under these circumstances and concerning that trial, petitioner had said that horrible and shocking things were going on; that a fair trial was impossible; that all of the rules of evidence were being scrapped so the Government could make its case; that the rules of evidence and procedure were made up as the case proceeded; and that unless the trial was stopped in its tracks certain new crimes would be created. Upon these findings that court made the following conclusions:

> ". . . she engaged and participated in a wilful oral attack upon the administration of justice in and by the said United States District Court for the District of Hawaii and by direct statement and implication impugned the integrity of the judge presiding therein and in the said pending case, within the territorial boundaries of the Territory of Hawaii, and thus tended to also create disrespect for the courts of justice and judicial officers generally, . . . She has thus committed what this court considers gross misconduct." [R. 118.]

There is no transcript or other verbatim account of petitioner's speech. A newspaper reporter named Matsuoka took longhand notes preparatory to writing the newspaper article referred to by the majority below. [R. 152, 153; see App. A, p. 13.] A later version of these notes,

"slightly expanded" and prepared at the request of Matsuoka's editor following the "to-do about it in court" [R. 152, 153, 159, 160] was received in evidence. The dissenting judges below accepted as accurate the version of petitioner's speech contained in these notes. Petitioner accepts them as the best available evidence of what she said.[7]

We summarize these notes:[8] (1) the trial is really of Jack Hall to get at the I.L.W.U.; (2) she wanted to tell about some rather *"shocking and horrible things that go on at the trial"*;[9] (3) MEN IN POWER are trying to put people in jail for what they think or read; (4) this is a conspiracy case and the GOVERNMENT uses conspiracy when it does not have a case—"conspiracy means to charge a lot of people for agreeing to do something you have never done"; (5) there is a myth about F.B.I. AGENTS—they spend their time investigating people's minds while hundreds of tax fraud cases go unpunished; (6) PAUL CROUCH is a witness because he was in Hawaii in 1924. His testimony of what he did in Russia in 1927 has no bearing; that was when Fujimoto was four years old and Hall was thirteen. He testified for weeks without mentioning a defendant; (7) a man should be responsible only for his own acts, not others; this is smear, part of the GOVERNMENT'S propaganda that started before the

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[7]Petitioner also gave a near-contemporaneous version of her speech when she reported to Judge Wiig on the first court day after the speech had been given. Her statement is set out in Appendix C to the majority opinion below. (App. A, pp. 31-37.)

[8]The notes are set out *in haec verba* as Appendix B to the majority opinion below (App. A, pp. 26-30), and they are summarized in the dissent. (App. A, pp. 45-47.)

[9]In this summary the words which are quoted and italicized pertain to the findings of the lower courts. The words in capital letters indicate the subject of most of the ideas and the objects of petitioner's criticisms.

jury was selected; (8) CROUCH testified to things no one could remember 12 years; (9) "THEY" use this kind of testimony "because THEY will do anything . . . to convict"; (10) the GOVERNMENT deliberately uses witnesses whose testimony is different from previous testimony and "have him say things in order to convict," "witnesses testify that the GOVERNMENT tells them to"; (11) JOHNSON testified about books in a duffel bag and Jack Hall is said to have violated the Smith Act because he saw a duffel bag with books in it. The GOVERMENT reads from the books, "they're not dealing with what Jack Hall said"; (12) the GOVERNMENT has carried on a propaganda barrage so long that "just hearing about communism is enough to jail"; (13) the F.B.I. pressures people to testify and causes them to lose their jobs if they won't cooperate and become informers; (14) *"There's no such thing as a fair trial in a Smith Act case. All rules of evidence have to be scrapped or the government can't make a case"*; (15) in the *Palakiko-Majors* case[10] testimony of an admission of having coerced a confession was excluded because the declarant was not available to deny it but in the same situation a federal judge lets CROUCH testify about 27 years ago when a defendant was five years old; (16) *"There's no fair trial in the case. They just make up the rules as they go along"*; (17) in 1949 Judge Medina permitted evidence as to what the defendants did from 1934 on, "but the GOVERNMENT can't make a case if it tells just what they did so THEY widened the rules and tell what other people did years ago . . . including the kitchen sink"; (18) *"Unless we stop the Smith trial in its tracks here there will be a new crime.*

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[10]See *Palakiko v. Harper* (9 Cir.), 209 F. 2d 75; cert. den. 347 U. S. 956. Petitioner was counsel of record there.

people will be charged with knowing what is included in books. ideas"; (19) we are threatened with "dark ages of thought control when people won't be able to speak freely"; (20) "she urged her audience to go out and explain what a vicious thing the smith act is."

The testimony of the witnesses concerning the Honokaa speech is fragmentary in the extreme. They give only snatches from the speech and make no attempt to present its full text or to set the isolated remarks in the context of the whole. No witness attempts to quote petitioner's language. The testimony of each witness is summarized in Appendix G.

The Evidence and the Findings—The Interviews of the Juror Fuller.

Petitioner paid three visits in as many days to the home of one David Fuller, a juror in the *Fujimoto* case, beginning at a time about four days after the verdict in that matter had been returned. The initiative for these interviews came from a sister of the juror [R. 314, 210, 432], who reported that he had said that he wanted to confess that the case was a "frame-up." [R. 314.] Petitioner entered the juror's home with no objection from either the juror or his wife. [R. 316, 210, 472.] His wife confirmed to petitioner the report of the sister. [R. 476, 477.] The juror made similar statements to petitioner at the first visit. [R. 477, 318-321.] At petitioner's suggestion Fuller agreed to talk with Hall, one of the convicted defendants. [R. 322.]

Petitioner returned next day with Hall, when, partly as a volunteered statement and partly in response to questioning, the juror related a number of things that went on in the juryroom during deliberations. Most of the

things set out in petitioner's affidavit to the trial judge [R. 42-45] were stated by the juror in the course of this interview. [R. 487-495.] Both petitioner and Hall questioned the juror from time to time. [R. 418, 419, 495.][11]

Petitioner prepared an affidavit covering these interviews which was submitted to Judge Wiig in support of a motion for a new trial in the *Fujimoto* case. [R. 33-47.]

The Territorial Court held the interviews to be "gross misconduct" but apparently did not base its disciplinary judgment thereon. [R. 117-119.] This interpretation of its action is reinforced by that court's finding that the practice of post verdict interviews of jurors "has not been uncommon, if not in fact common practice." [R. 119.] The majority below, however, read the Territorial Court's opinion as "a statement that the penalty for the two charges is imposed concurrently," although conceding that "the matter is not clear." (App. A, p. 20.) The court below said that, if it were reversing on the first charge (the speech), it would "refer the matter back to the Territorial Court to determine clearly and anew what sanction it intended to apply in the second charge." (App. A, p. 20.) It then proceeded to hold that "the evidence sustains the second charge." (App. A, p. 21.)

The Genesis of the Charges.

The origin of the charges against petitioner reveals a curious development of the rules of the Territorial Court so as to effect a special application to this case. The conduct laid against petitioner was engaged in while she was acting as one of counsel of record in the District

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[11]On the third visit there was apparently no discussion with the juror of matters which went on in the jury room. [R. 217, 218, 419, 420.]

Court and in relation to a case pending there. The investigation ordered by Judge Wiig [R. 31-33] evoked no contempt or disciplinary proceedings in his court. At the end of the trial he complimented all counsel, including petitioner, for their "assistance, conduct and demeanor." [R. 510, 524.]

When the trial was over Judge Wiig, without indicating any position in the matter, asked the local bar association "to look into the conduct of Harriet Bouslog in connection with the Smith Act trial." [R. 539-541.] The bar association took no action while the matter was investigated by the Attorney General of the Territory. [R. 535-536.] As the rules of the Territorial Court then stood, only the aggrieved party or the Attorney General could file complaints of attorneys' misconduct. (See App. C, *post*, p. 67.) When the Attorney General took no action the bar association devised an amendment to the Territorial Court's rules permitting the association to file such complaints. (See App. D, *post*, p. 70.) That rule was adopted in April, 1954, and the complaint was filed July 8, 1954, some 18 months after the Honokaa speech and over a year after the juror interviews.

The report of the Legal Ethics Committee was not made until July 1, 1955. [R. 14.] The Territorial Court's decision was rendered April 6, 1956 [R. 93 ff.]; that of the court below on June 9, 1958.

Petitioner's Professional Record.

Petitioner has been a member of the bar since 1936, in the Territory since 1941. [R. 428.] Her professional career has been exemplary. Commenting that "this is no ordinary case" (App. A, p. 42; see also App. A, pp. 63-66) the dissenters below alluded to petitioner's distinguished record of representing unpopular clients. But

this has been a career which involves even more than representing victims of public prejudice or passion. It has encompassed, in the Islands, the emergence of unionization among the workers in the vast sugar and pineapple plantations and in the longshore industry. The conflict of forces thus precipitated contained not only class but racial tensions. There ensued both strike turbulence in the struggle for improved working and living conditions as well as pressures to alter both law and custom affecting the social, civic and political participation of the great non-white masses in the community life of the Islands.[12] In this milieu petitioner served as lawyer for the workers, and her endeavors involved her in strike and picketing cases and the application thereto of national and local statutes, criminal prosecutions, challenges to the constitutionality of criminal states and jury selection systems, and suits to prevent racial discrimination. It is not an exaggeration to say that petitioner's work in these areas contributed to the resolution of profound and potentially explosive social conflicts through the processes of law and reason rather than by violence and destruction.

Basis of Jurisdiction Below.

The judgment of the Territorial Court was appealed to the court below under 28 U. S. C. 1293 on the grounds that this is a case (a) "involving the Constitution . . . of the United States" and (b) wherein the "value in controversy exceeds $5000.00."[13]

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[12]See *e.g., International Longshoremen's and Warehousemen's Union v. Ackerman*, 82 Fed. Supp. 65, 74-86, 95-112, 113-122 (opinion by Circuit Judge Biggs); reversed on procedural grounds 187 F. 2d 860 (9 Cir.), cert. den. 342 U. S. 859; *United States v. Fujimoto*, 105 Fed. Supp. 727, 729, opinion by Circuit Judge Stephens.

[13]The texts of 28 U. S. C. 1293 and 2108 are set out in Appendix J and petitioner's affidavit as to jurisdictional amount, in Appendix K.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. In Holding That a Lawyer, While Serving as Counsel of Record in a Pending Case, May Not Publicly Comment on That Case but Is Subject to Unspecified "Restraints Not Applicable to the Public in General" (App. A, p. 18) the Court Below Decided an Important Federal Question Which Has Not Been, but Should Be, Settled by This Court.

This tribunal has held that the First Amendment secures a broad latitude of comment by litigants and newspaper editors on cases pending in the courts. *Bridges v. California*, 314 U. S. 252; *Pennekamp v. Florida*, 328 U. S. 331; *Craig v. Harney*, 331 U. S. 367. No decision of this Court directly deals with the question whether the extensive protection accorded non-lawyers applies to members of the bar, whether or not they are counsel of record. The paramount value served by free public discussion at a time when the issues are current and on the part of those best informed argues both the importance of the question here and the error of the holding below.

The court below took the view that participation in this area of public discussion is forbidden the lawyer of record *while the case is pending*. During that period, it held, "the only proper forum for the lawyer to vindicate his clients" is the courtroom. ". . . the judicial process is entitled to protection from those who get their license from a judicial temple . . ." (App. A, p. 15.) Laymen like Bridges and the Times-Mirror are in a different category for they were not "court officers charged with the duty of keeping the temple clean." (App. A, p. 15; see also App. A, p. 18.)

Such sweeping interdiction rests on premises at war with free speech. The lawyer who comments publicly on the case in which he is engaged may, as here, seek, not to vindicate a client, but to alert the public to what in his informed judgment is a serious problem, perhaps a public danger. If perchance he is right he affords the court no "protection" by silence. He discharges no "duty of keeping the temple clean" by withholding criticism. Neither the tabernacle of justice nor the householder's floor is cleansed by sweeping things under the rug. Silence on the part of counsel of record at the time the trial is going on may well result in no effective discussion of his grievances. The key concern of a free society is prompt and meaningful discussion of all issues affecting all branches of government without exception.

There is nothing in the lawyer's license that renders him a built-in apologist for the *status quo* in the judicial branch. So far as we are aware he owes no duty by silence or utterance to afford "protection" to a judicial process that, through any means, results in unfairness. The term "officer of the court" does not have a literal meaning (*Cammer v. United States,* 350 U. S. 399) and it surely does not conscript counsel of record to the task of by silence creating the appearance of justice to mask injustice.

This is not to say that there may not be limits to the lawyer's freedom of comment on pending cases. One is that indicated in *Bridges, Pennekamp* and *Craig, supra.* As with other citizens, he may not engage in utterances that create an "extremely high" risk of interfering with "fair judicial administration." This Court has wisely not attempted to draw any more specifically the line that

sets apart the impermissible in this area. Nor need it in this case. The utterances charged against petitioner fall far short of the expressions afforded protection in the cited cases.

Another limitation is one growing out of the lawyer's position as such. His intimate relation to the court and the judicial process has been said to require that he not engage in comment that brings the courts into disrespect. But here there operates a strict test designed to protect both freedom of speech and the independence of the profession. To merit discipline the utterances must have an enormity that is not consistent with the ability of the court to maintain public respect. We deal with this concept at greater length later herein (*post,* Point 3). Suffice it here to state that the speech condemned by this test is that which (a) threatens the person or reputation of the judge or (b) charges that the judge or court has knowingly misused its powers in a particular case or (c) asserts that the judicial officer is corrupt. No such utterances are involved here.

These we submit apply to lawyers whether they comment on pending matters in which they are of record or otherwise. The crucial fact is not their connection with the pending case but what, *as lawyers,* they say. We have found no cases prior to this holding that the lawyer's duty to maintain the respect owing the courts imposes any greater limit upon the lawyer of record than any other attorney. The cases predicate the limitations here noted upon the lawyer's relation to the court, not to the case.

The court below ignored these criteria, except for its treatment of the clear and present danger test which is discussed below. It offered no standard of its own other

than "restraints not applicable to the public in general" (App. A, p. 18) and "unseemly and certainly at the wrong time" (App. A, p. 17) which are discussed below. The decision stands for the naked proposition that lawyers appearing in pending cases may not comment publicly on what transpires in the courtroom. This is a far-reaching ban on highly useful speech.

2. The Court Below In Imposing the Limitations on Lawyer's Speech Just Noted Decided Several Subsidiary Federal Questions in a Way in Conflict With the Applicable Decisions of This Court in That It Rejected the Clear and Present Danger Test or Any Standard Referable to Risks to Legitimate Ends of Government and Substituted Vague and Undefined Standards Which Included Subjective Evaluation of the Listener.

The Court of Appeals held (App. A, pp. 15, 16) that the holding of this Court in *Bridges v. California, supra,* had no application here and that it rejected the clear and present danger test. Since *Schenk v. United States,* 249 U. S. 47, the test of governmental power to limit speech has been whether its words and circumstantial context are such as to create a clear and present danger of bringing about a substantive evil within the power of Government to prevent. This test has been specifically applied to utterances concerning courts and matters pending before them with the express admonition that the evil must be "extremely serious" and the "degree of imminence extremely high" before the utterance can be punished. *Bridges v. California,* 314 U. S. at 263.

While the clear and present danger test is not a formulary that substitutes for analysis, it does offer a method of evaluation that employs objective criteria

admissibility of the facts his investigation discloses. If he acts upon facts sufficient to put a reasonable person on inquiry he should not be required to develop admissible evidence on pain of severe discipline. Any more severe test would inhibit the lawyer by fear of subsequent punishment and thus deprive the administration of justice of invaluable assistance.

But the rule of the court below makes any inquiry of jurors under any circumstances misconduct subject to severe sanctions. Interview of jurors in connection with matters which in the words of this Court affect "the plainest principles of justice" are absolutely interdicted equally with those which are inadmissible to affect the verdict. It places a crippling restraint upon a lawyer's performance of tasks essential to the protection of the individual and the court. It menaces the independence of the profession. This restraint operates in the federal courts until removed by this Court.

5. In Holding That the Territorial Court Had Jurisdiction to Adjudge the Conduct of a Federal Practitioner Before and in Relation to a Federal Court and Concerning a Case Pending in the Federal Court, the Court Below Decided an Important Question of Federal Law Pertaining to the Proper Relations Between the Territorial Courts and the Federal Courts Which Has Not Been, but Should Be, Decided by This Court.

The Territorial Court has fixed standards of conduct for members of the federal bar in relation to the federal court and concerning matters pending before the federal court. As to both the speech and the juror interview these standards intimately affect the administration of justice

reasonably referable to legitimate ends of government. In rejecting this test the court below (App. A, pp. 14-17) employed no such criteria. It particularized no evil to be avoided, no objective of public interest to be attained. It failed to examine the relationship, causal, logical or spatial, between the utterances in question and any legitimate concern of the state. The speech here was held to merit the drastic consequences visited upon petitioner because, for reasons not stated, it went beyond the undefined "restraints" said to be "applicable" to counsel of record while not "applicable to the public in general". Beyond such protean standards as these, the court below rested its judgment upon the observation that "the comment was unseemly and certainly at the wrong time" (App. A, p. 17) and the rather Delphic statement that the term "officer of the court" has "vitality and is not a transparent euphemism". (App. A, p. 18.)

If the litmus fashioned in the opinion below were to assay public comment of lawyers about the pending cases in which they appear, none would dare to speak. The opinion below gives no indication as to the nature of these "restraints", unless they be to forbid all public comment on any pending case by a lawyer of record. The standard of "unseemly" would also cut off all such comment. Such a test imports largely subjective values, which vary with the bent of the listener, and is censorial. *Thomas v. Collins,* 323 U. S. 516, 534; *Herndon v. Lowry,* 301 U. S. 242, 262-264. The good taste or seemliness of the speaker is not the measure of his right to speak, even where he is offensive and stirs anger and unrest. *Cantwell v. Connecticut,* 310 U. S. 296, 310; *Terminiello v, Chicago,* 337 U. S. 1, 5.

Moreover, the rejection of the clear and present danger test was couched by the court below in language of such disingenuous exaggeration as to unsettle the gravity of so fundamental a constitutional issue. Patently the courts' power to discipline a lawyer for speech may arise in situations which fall far short of that where "his voice would have to rise to a mighty cacaphony reaching the point of causing the audience (a clear and present danger) to march on the court house or to set up such a howl that the judge would be terrified". (App. A, pp. 15, 16.) With no nicer dissection of the problem than this has the court below fashioned a rule that forbids all public comment on pending cases by attorneys of record. It has given no attention to whether the speech here was objectively capable of interfering with the fair administration of justice (*Bridges, Pennekamp, Craig, supra*) or whether, reasonably weighed, that speech could be said to have constituted the offense of failing to maintain the respect due the courts as the cases have defined such conduct.[14] That petitioner was counsel of record and that her comment was critical of what went on in the Smith Act trial before Judge Wiig (as well as all others) in and of themselves were the basis for the lower court's affirmance of the Territorial Court's judgment. This is a flat interdiction of speech concerning pending cases by counsel of record.

The impact of such First Amendment standards on professional independence is manifest. The lawyer is afforded no test whereby before he speaks he can measure his utterances against permissibility in terms of his professional position or the legitimate concerns of government. The criterion of "unseemly" indicated in the opinion below,

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[14]See *post*, Point 3, notes 21, 22 and 23.

especially when combined with the process of arbitrary inference indulged by both lower courts (see *post*, Point 3), would have the lawyer "at the mercy of the varied understanding of his hearers." *Thomas v. Collins, supra,* at 535. In these circumstances there is only one safe course—not to speak.

But not speak for how long? Until the last conceivable judicial act has been performed in the case? Not, let us say, from 1951 when the *Fujimoto* indictment was found until 1958, when it was dismissed? Or, to speak, but ever so cautiously? Even the most considered criticism of the conduct of a trial that broached upon the nature and effect of rules of law applied therein would be open to some claim that it attacks the trial judge. One recognized function of the lawyer is to serve as a tribune "to warn their fellows when liberty is threatened and to lead them in combating the danger." Editorial, 39 A. B. A. Jour. 692. See also *In re Hearings Concerning Canon 35* (Colo. 1956), 296 P. 2d 465, 470; Jessup, *The Professional Ideals of the Lawyer, A Study of Legal Ethics* (N. Y. 1925), p. 24.[15]

Of no less moment is the effect of these restraints upon the lawyer's court room advocacy. If a lawyer is to be disciplined for his criticism of rules of law and their application, the tactics of the prosecutor and other law enforcement agencies when these criticisms are made in public 180 miles from the seat of trial, he will be hesitant to say them to the judge's face. We have no place for a bar that is not free to tell a judge that he is not giving an accused a free trial or that his rulings advantage an opponent.

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[15]The literature abounds with recognition of the interconnection between this function and the necessities of a free society. See Appendix H, *post,* p. 83.

3. In Affirming the Findings of the Territorial Court That Petitioner's Speech Constituted a Wilful Attack Upon the Administration of Justice in the District Court and Impugned the Integrity of the Trial Judge, the Court Below Decided a Federal Question in a Way in Conflict With the Applicable Decisions of This Court and so Far Sanctioned a Departure From the Accepted and Usual Course of Judicial Proceedings as to Call for the Exercise of This Court's Power of Supervision in That the Finding Is so Dogmatic an Inference as to Be Wholly Unwarranted and so arbitrary as to Be Offensive to Due Process.

We deal here with oral evidence of verbal utterances made at a public meeting nearly two years before the disciplinary proceedings were held. The treachery of such evidence of such matters has long been recognized, as well as the need for the most careful proof which sets out the utterance as a whole with full context and sedulous precision. (See Wigmore, Evidence, Third Ed., Vol. 7, pp. 466, 467, Sec. 2094; *Baumgartner v. United States*, 322 U. S. 665, 675.) The only evidence which approaches this quality is the "notes" of Matsuoka. They are subject to some qualification since they do not profess to be *verbatim* [R. 152], and they are not his original notes but a somewhat "expanded" version made up at the request of his editor after the news accounts of the speech had led to the "to do" in Judge Wiig's court. [R. 159-160, 153.] Although the notes are the best evidence available, these limitations indicate that even this evidence is, to some extent, an interpretation of petitioner's actual speech, and that inferences drawn from it which involve further interpretation may well be unreliable. Subject to

this caveat we, as did the dissenters below (App. A, p. 45), rest our analysis upon the speech as these notes reflect it.

The majority opinion below, in marked contrast to the dissent, evinces no search for reliable evidence of the speech as a whole and no examination of passages in their context. The findings of the majority, as those of the Territorial Court, rest upon isolated selections only. The controlling findings misstate the evidence or by truncation give it a different meaning. Thus (1) the finding that of the *Fujimoto* trial petitioner had said "that horrible and shocking things were going on at the current Smith Act trial in Honolulu";[16] the "notes" show (App. A, p. 26) that this was an introductory remark by way of preface to her speech. It must therefore take on meaning only from all that followed it; (2) the findings that petitioner said of the *Fujimoto* trial "that the trial was not a fair one": according to the notes she at one point said "there is no such thing as a fair trial in a Smith Act case" and this in a context of criticism of F.B.I. tactics in coercing witnesses and a discussion of the differences in admissibility of hearsay in a conspiracy case and in a non-conspiracy case. (App. A, pp. 29-30.) Elsewhere the notes say "there's no fair trial in the case. They just make up the rules as they go along" (App. A, p. 30), and this in a context of the different rules of admissibility of hearsay in conspiracy cases and the government's pressure to expand the rules so as to introduce testimony of conduct by non-defendants remote in time; (3) the finding that petitioner said of the *Fujimoto* trial, "that 'they' just made up

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[16]The findings of the Court of Appeals are at App. A, p. 14. Those of the Territorial Court at R. 117.

the rules as 'they' went along":[17] according to the notes, she said "they just make up the rules as they go along" and this in a context wherein petitioner accused the Government attorneys of seeking to go far beyond the limitations laid down by Judge Medina in the trial of the *Dennis* case; (4) the finding that of the *Fujimoto* trial petitioner said "that unless the Smith Act trial at Honolulu was stopped in its tracks there would be a new crime—people will be charged with knowing what is included in books": this is virtually a direct quote from the notes. (App. A, p. 30.) As they show, the remark was in a context of observations about another Smith Act trial and the dangers of thought control.

In our statement of the case, *ante*, we have summarized the "notes" and have italicized and quoted the portions bearing upon the findings so as readily to give their context. The words in capital letters indicate the object of petitioner's criticism. Obviously the main theme of her talk was the abuse by the prosecutors of the conspiracy theory in which she had persuasive and learned company.[18] Next in importance was her attack upon the unreliability of Crouch and other Government witnesses.[19]

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[17]The court below did *not* find, as had the Territorial Court, that petitioner said "all the rules of evidence were being scrapped so the Government could make its case." We therefore assume that this finding is no longer in the case.

[18]See Chief Justice Taft and the Senior Circuit Judges, Annual Report of the Attorney General, 1925, pp. 5-6; Justice Jackson concurring in *Krulewitch v. United States*, 336 U. S. 440, 453; Judge Learned Hand in *United States v. Falcone* (2 Cir.), 109 F. 2d 579, 581. See also Lasky, *The Long Bow of Lucretius, Book IV, Line 817*, 43 Cal. L. Rev. 596.

[19]Claims that this witness had a long history of perjured testimony in Smith Act and related prosecutions went unchallenged by the Government, in *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115, 121, 124. For another instance of the use of an obviously unreliable witness in a Smith Act case see *Mesarosh v. United States*, 352 U. S. 1.

That petitioner said that horrible and shocking things were going on at the trial is in itself no evidence that she charged misconduct to the judge or impugned his integrity. That she said "the trial was not a fair one" in and of itself is not an attack upon the court or judge conducting the trial. The unfairness of a trial may result from many things beyond the judge's control, such as the climate of opinion in the vicinage and the use of perjurious witnesses by the prosecutor. The context of these remarks shows that the unfairness petitioner doubtless spoke of was that resulting from F.B.I. coercion of witnesses and the operation of the hearsay rule in conspiracy cases. Concerning the remark about making up the rules as "they" went along, the court below had to read the word "they" as including the prosecutors and Judge Wiig in order to support the judgment of the Territorial Court. (App. A, p. 15.) No such reading of that pronoun is justified by the context of the Matsuoka notes. For they show that petitioner was talking about the conduct of lawyers, Government lawyers. Of the witnesses who remembered a remark substantially similar to this, four [Ferreira, R. 163; John D. Morse, R. 165; Andrade, R. 181 and Phyllis Morse, R. 185] said petitioner spoke of the "Government", and two, Matsuoka [R. 151] and Oliyal [R. 171] used the pronoun "they". To construe "they" as referring to or including Judge Wiig is a plain distortion of the evidence.

Whatever could have been meant by the remark about stopping the trial in its tracks, this could obviously have no reference to Judge Wiig. A fair reading of the statement would attribute to petitioner some such meaning as getting an acquittal by directed verdict or otherwise, or reversing the case on appeal or in some other way resist-

ing and defeating the Government's efforts to prosecute people under a law which petitioner regarded as unfair because it employed the dragnet of conspiracy and was predicated upon books and thoughts.

Arbitrary fact finding based upon no evidence or drawing inferences that the law or good sense and experience forbid, offends due process. There must be evidence that "rationally justifies" the findings. *Schware v. Board of Bar Examiners*, 353 U. S. 232, 246; *Konigsberg v. State Bar*, 353 U. S. 252, 273; *Wieman v. Updegraf*, 344 U. S. 183, 191; *Slochower v. Board of Education*, 350 U. S. 551. See also *Morisette v. United States*, 342 U. S. 246; *Maggio v. Zeitz*, 333 U. S. 56; *Mortensen v. United States*, 322 U. S. 369.

The court below failed to discharge the responsibility cast upon it by the applicable principles of appellate review. Because of the free speech problems here the findings necessary to support the judgment of the Territorial Court had to rest upon a solidity of evidence that took into account the entire speech, the context of the assertedly offensive language and the fair meaning which reasonable minds having petitioner's familiarity with legal procedures would give to the words used, and it was for the court below to make its own evaluation of the evidence. (*Bridges, Pennekamp, Craig, supra.*) The claim of deprivation of due process required the same ransacking of the record. *Schware, Konigsberg, supra, Norris v. Alabama*, 294 U. S. 587. As a lawyer's discipline case the standard of proof was "clear and convincing", free from doubt,[20] and this standard necessitates similar

[20]This is the rule of the Territorial Court (*In re Trask*, 30 Haw. 736, 740), and it is the universal view. Drinker, *Legal Ethics*, 1953, Columbia Univ. Press, p. 46.

reappraisal of the evidence on appeal. Compare *Schneiderman v. United States*, 320 U. S. 118, 122; *Knauer v. United States*, 328 U. S. 654, 658; *United States v. Bridges* (D. C. Cal.), 133 Fed. Supp. 638, 641.

The standards of proof imposed by these considerations can not be satisfied by equivocal evidence. Absent the gloss placed upon "they" by the court below each of the remarks found can reasonably be read as not pertaining to the judge. Where an utterance can be reasonably read as having an innocent meaning the imperatives of the First Amendment deprive it of probative force for guilt. *Schneiderman v. United States*, 320 U. S. 118, 157-159; *Baumgartner v. United States*, 322 U. S. 665, 674, 675; *Hartzel v. United States*, 322 U. S. 680, 687-690; see also *Fiske v. Kansas*, 274 U. S. 380.

The arbitrariness of the fact finding also works a grave infringement of professional freedom. The "gross misconduct" found here is that which the American decisions usually define as failing to maintain the respect due the courts. Because of the need that the "independence of the bar" be "scrupulously guarded" (*Ex parte Secombe*, 19 How. 9, 13) the offense is narrowly drawn. Discipline is imposed only when the lawyer's utterance is marked with an enormity inconsistent with the court's ability to maintain public respect. *Ex parte Wall*, 107 U. S. 265, 288; *Bradley v. Fisher*, 13 Wall. 335, 354. It embraces only those utterances which threatened the person or reputation of the judge[21] or charge that he has knowingly misused his powers in a particular case[22] or claim that the judge

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[21] See, *e.g.*, *Bradley v. Fisher*, 13 Wall. 335. (See App. I for further cases.)

[22] See, *e.g.*, *In re Hilton*, 48 Utah 172, 158 Pac. 691. (See App. I for further cases.)

is corrupt or politically motivated.[23] Petitioner's statements do not meet these criteria. Affront to the courts has been glossed upon her speech by implication and tendency and baseless inference. The heretofore narrowly drawn limitation upon lawyer's utterance has been converted into a weapon of censorship upon the lawyer's advocacy in and out of court.

4. The Court Below Sustained the Findings of the Territorial Court That Petitioner's Interviews of the Juror Fuller Constituted Gross Misconduct Meriting Severe Discipline. In This the Court Below Decided an Important Federal Question Which Has Not Been, but Should Be, Settled by This Court.

Petitioner interviewed, *post* verdict, a juror who had served in the *Fujimoto* case. This she did at the request of his sister and with the consent of his wife after having been told that the juror appeared to be ill and irrational and had made many statements to the effect that he had acted wrongly and that the case was "a frame-up". She inquired of him what had gone on in the jury room in an obvious effort to ascertain either (a) possible infirmity in the verdict by reason of this juror's imbalance during the trial or (b) the factual basis for the assertion of wrong-doing and frame-up. The language of the Territorial Court and its reliance upon *Rakes v. United States* (C. A. 4), 169 F. 2d 739 [R. 119-120] make it plain that the mere interview and interrogation of the juror constitute the gravamen of the offense found.

This is a question for this Court to settle because petitioner's conduct occurred as counsel of record in a case

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[23] See, *e.g.*, *Cobb v. United States* (9 Cir.), 172 Fed. 641. (See App. I for further cases.)

in a federal court with respect to a juror who had served in that same court. The issue is whether a lawyer, a member of the bar of a District Court, while serving in a case pending in that court, commits gross misconduct by interviewing an excused trial juror in that case concerning matters related to the juror's asseverations of wrong-doing and frame-up. This problem relates both to the scope of a lawyer's freedom in the federal jurisdiction to investigate facts bearing upon his client's rights as well as the protection afforded those convicted of serious crime where a cloud is cast upon the verdict. This is no local matter for the Territorial Court or the Territorial Bar. The conduct here occurred in a federal case in a federal court. The court below has held it was misconduct in the federal jurisdiction. In an earlier decision the court below reached a similar result (*Northern Pacific Railway v. Mely* (C. A. 9), 219 F. 2d 199) as did the Fourth Circuit in *Rakes, supra.*

The question calls for a nice balancing of weighty interests. In *Mely* and *Rakes* it was thought that the need for insulating trial jurors from "potential" outside influence arising from an awareness that they might be interrogated concerning the occurrences in the jury room, required the prohibition against interrogation by lawyers. On the other hand there is the public concern in obtaining honest, untainted verdicts by rational jurors. In this connection it has long been recognized that to foreclose all evidence, taken from the jurors' mouths, of influences upon the deliberations might well violate the "plainest principles of justice". *United States v. Reid*, 53 U. S. 361, 366. In that case and in *Mattox v. United States*, 146 U. S. 140, 148-150, this Court held that evidence of "overt acts" (as contrasted with "the personal conscious-

ness" of the jurors, their thought processes) would be admissible to show improper influence upon the verdict. These cases recognize that the existence of "overt acts" is subject to proof and rebuttal by ordinary means of trial whereas matters pertaining to the juror's mental state are incapable of such proof except by the juror's word alone. It would seem that only in the latter case has the rule against permitting the juror's testimony to impeach his own verdict had its genesis and application. *Hyde v. United States*, 225 U. S. 347; *McDonald v. Pless*, 238 U. S. 264. Judge Learned Hand has cogently argued that the rubric against permitting the jurors to impeach their verdict forecloses valuable evidence and that the correct rule should be as here stated from the early cases. *Jorgensen v. York Ice Machinery Corp.* (C. A. 2), 160 F. 2d 432. See also Wigmore, *Evidence*, 3d Ed., Sec. 2353; Compare *Clark v. United States*, 289 U. S. 1, 12-18.

Surely facts relevant to a juror's wrong-doing and "frame-up" in a federal prosecution or his mental imbalance while serving, might well have been admissible to overturn the *Fujimoto* verdict. That being so, petitioner was right in trying to find out what facts there were by interviewing the juror who spoke of these things. She could have done no less to discharge her responsibility to both the District Court and her clients who then faced long prison terms and heavy fines. Here, surely, the public interest in the purity of justice outweighs any other. It would indeed be a hollow rule ringed with irony that would make evidence of this kind admissible but hold the lawyer's investigation of suggestions of it to be misconduct. Nor is it practicable narrowly to circumscribe the lawyer's conduct by rules pertaining to the

in the federal courts. The conduct here does not involve an offense all legal standards condemn. The quality of the conduct as censurable or not stems directly from its relationship to the pending federal matter and its impact upon it. The adjudication of the claimed offensiveness of the conduct was an inseparable part of the federal court's responsibility to manage its own affairs. Judge Wiig, in turning the matter over to the Bar Association, set in motion a train of events that led to a usurpation of his court's power in matters gravely affecting its administration of justice.

The Territorial Court has established, not rules for lawyers in cases before its courts, but standards of conduct for federal attorneys in cases before federal courts. The "deference" normally shown by federal authority for the integrity of a local jurisdiction is, we submit, a two-way street. Compare *Waialua Agricultural Co. v. Christian,* 305 U. S. 91, 108-109.

The procedure followed in *In re Isserman,* 9 N. J. 269, 87 A. 2d 903, indicates the proper relations between the state and federal systems.[24] New Jersey did not undertake to decide that Isserman committed an offense against the federal court. It having been finally decided by the federal court that Isserman had committed the federal offense, New Jersey determined his fitness on that account to remain a member of its bar.

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[24]Isserman had been held in contempt for courtroom conduct during the trial of the *Dennis* case. (341 U. S. 494.) He was adjudged guilty by the federal court in accordance with its own standards and all questions relating thereto were finally resolved by this Court *before* the State court acted. *Sacher v. United States,* 343 U. S. 1.

The genesis of this essentially federal case from the complaint of a local bar association before a local court opened the door to the potential influence of local currents. Petitioner's professional role as counsel for the unpopular union as well as for Smith Act defendants identified her on one side of a social structure so sharply divided as to be called "tense" by one Circuit Judge (*I.L.W.U. v. Ackerman, supra*, p. 77) and by another as one of "clashing economic interests". (*United States v. Fujimoto, supra*, p. 729). As petitioner's affidavit supporting her suggestion of disqualification of Mr. Justice Rice of the Territorial Court [R. 52-65][25] indicates, she and he not only stem from opposite poles in a profoundly defined social antagonism but have opposed each other in bitter litigation arising out of labor controversies.

This Court has recognized that local forces are less sensitive to considerations of national stature and less vigilant in vindicating them. Compare *Board of Education v. Barnette*, 319 U. S. 624, 637-638. It is not claimed and it need not be decided that the judgment of the Territorial Court is tainted by these influences. In areas of exclusive federal concern it has been established policy to eliminate even the appearance of local influences possibly reflecting personal bitterness or group ambitions. Compare *Pennsylvania v. Nelson*, 350 U. S. 497, 507.

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[25]The Territorial Court rejected the suggestion of disqualification. [R. 71-90.] Justice Stainbach withdrew to avoid the appearance of unfairness. [R. 88-90.] Chief Justice Towse was of the opinion that Justice Rice should have done likewise. [R. 92-93.]

Conclusion.

Upon all of the foregoing petitioner prays that this Court issue its Writ of Certiorari to the court below and fully review the questions presented here upon the entire record.

Respectfully submitted,

JOHN T. MCTERNAN,
Attorney for Petitioner.

MYER C. SYMONDS,
Of Counsel.

APPENDIX A.

Opinions of the United States Court of Appeals for Ninth Circuit.

In the Matter of Disciplinary Proceeding against Harriet Bouslog Sawyer, a member of the Territorial Bar of the Territory of Hawaii.

them jointly with violations of the Smith Act. On Labor Day five days later on the Island of Kauai she was pleading the cause of the defendants before a Labor Day audience, castigating Smith Act cases in general and this case in particular. That speech resulted in no charges against her and the date she commenced representation of defendants in the case is not clear.

The Honolulu Smith Act case went to trial on November 5, 1952. Eventually the trial was concluded and a jury verdict was returned on June 19, 1953, finding the defendants guilty.[2] It is definite that throughout the extended trial she was representing one or more defendants. Sometimes she missed sessions; if so, she was busy on legal research incident to the case.

On Sunday, December 14, 1952, during the period of the trial, she went to the town of Honokaa on the Island of Hawaii[3] and with the defendant Hall addressed a public meeting primarily attended by members of the International Longshoremen's and Warehousemen's Union. Some segment or segments of that union were financing in whole or in part the defense of the seven. The exact purpose of the meeting does not seem to be clear. Hall and Mrs. Sawyer were apparently the main speakers, although there were others. Based on their own subsequent testimony, it would be fair to characterize the gathering as some kind of an old fashioned "indignation meeting." The speeches of the two resulted in publicity throughout the Islands. The newspaper stories caused the trial judge, Honorable Jon Wiig, to suspend temporarily the trial and question Mrs. Sawyer in open court about her speech at Honokaa. When the colloquy was done, Judge Wiig announced he was not satisfied with her explanation and he instructed the U. S. Attorney for the District of Hawaii to make an investigation.[4] (Mrs. Sawyer's explanation and colloquy with the court is

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[2]The convictions were reversed by this court on January 16, 1958, upon the authority of Yates v. United States, 354 U.S. 298. See Fujimoto, et al. v. United States, No. 13,915, ... F.2d .....

[3]Honolulu is located on the Island of Oahu. The Island of Hawaii is popularly known throughout the Territory of Hawaii as the "Big Island."

[4]A. William Barlow was the United States Attorney for the District of Hawaii during the Smith Act trial at Honolulu and an active par-

set forth as Appendix C.) No proceedings in the district court were ever brought.

Within a day or so after the verdict, a juror, David P. Fuller, Jr., suffered a nervous breakdown and generally became most incompetent. The case was "on his mind;" how much is disputed as is his rationality at the times of various conversations. Visits from Mrs. Sawyer and from Mrs. Sawyer and Hall to Fuller followed. A sister-in-law, Mrs. Ellen Fuller Cabreros, was present as well as Mrs. Fuller and one or more of the Fuller children. As a consequence of these visits and in support of the motion for new trial Mrs. Fuller, Mrs. Cabreros and Hall all made affidavits as to statements made to them by Fuller,[5] the effect of which, if admissible, would be to prove by Fuller's statements to Mrs. Sawyer and Hall what went on in the jury room in the secret deliberations. The purpose was to impeach the verdict. Parenthetically, such affidavits ought to have been stricken from the file of the Smith Act case. (They were merely not considered.) It is hard to believe that counsel did not know of their inadmissibility.

After the close of the trial Judge Wiig orally requested the Hawaii Bar Association, through its president, to look into Mrs. Sawyer's professional conduct during the trial.

This resulted in the association filing on July 8, 1954,[6] with the Supreme Court of Hawaii one complaint with two charges of misconduct in it against Mrs. Sawyer. One charge dealt with the Honokaa speech; the other with the manner of presentation and preparation (the surrounding conduct) of the affidavits. The second charge did not assert falsity, per se, of the affidavits.

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ticipant in the trials. He left the office on September 2, 1954. He appears to have been active in the preparation of the case. He presented it to the legal ethics committee at its hearings which began November 24, 1954. Then, on July 8, 1955, he and the attorney general were appointed to present the case to the court. Barlow's representation in behalf of the complaint, and now the judgment, has continued on appeal.

[5]Mrs. Fuller refused to sign an affidavit prepared for her by Mrs. Sawyer.

[6]Prior to April 21, 1954, under its Rule 19, charges against an attorney were authorized to be filed by the attorney general of Hawaii or

The text of the complaint was as follows:

"COMPLAINT UNDER RULE 19

"To the Honorable, the Justices of the Supreme Court of the territory of Hawaii:

"Comes now the Bar Association of Hawaii, an unincorporated association, and on information and belief complains to this Honorable Court under Rule 19 of the Rules hereof as follows:

I.

"That Harriet Bouslog Sawyer, hereinafter referred to as the Licensee, is and at all times hereinafter mentioned continuously has been an attorney-at-law duly licensed and admitted to practice before all of the courts of the Territory of Hawaii and before the United States District Court for the District of Hawaii, and that the said Licensee is now and during all of said times herein mentioned has been a practitioner before said courts.

II.

"That the said Licensee, while appearing as counsel of record for certain defendants in that certain case in the United States District Court for the District of Hawaii entitled "United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et al., Defendants," being Criminal Number 10495 in said Court, during the course of the trial of said case, to wit, on or about December 14, 1952, did say during a speech to a public gathering in Honokaa, Hawaii, that horrible and shocking things were going on at said trial; that a fair trial was impossible; that all of the rules of evidence were being scrapped so the government could make its case; that the rules of evidence and procedure were made up as the case proceeded; and that unless the trial was stopped in its tracks certain new crimes would be created.

"any person aggrieved." By an amendment made on April 21, 1954, charges were authorized to be filed by the attorney general, the Bar Association of Hawaii, or any person aggrieved.

III.

"That said Licensee did during the course of said trial and shortly after rendition of a verdict therein visit a juror who was known by her to be indisposed, and thereafter submitted her affidavit concerning an interview with said juror to the presiding judge under circumstances indicating a failure to comply with standards of professional conduct required of practitioners of law licensed to practice before this Court.

"Wherefore, the Bar Association of Hawaii prays this Court to refer this complaint to the Committee on Legal Ethics and Unauthorized Practice of this Court for investigation in conformity with Rule 19 of the Rules of this Court.

"Dated: Honolulu, Hawaii, July 8, 1954.

Respectfully submitted,

BAR ASSOCIATION OF HAWAII

By /s/ MASAJI MARUMOTO,

Its President.

"[Endorsed]: Filed July 8, 1954.

"[Title of Supreme Court and Cause.]"

The Supreme Court of the Territory of Hawaii referred the complaint to its Legal Ethics Committee for investigation. Before holding a hearing the committee required the Bar Association of Hawaii to furnish a bill of particulars on the second charge. On September 29, 1954, the bill was filed as follows:

"BILL OF PARTICULARS

"Pursuant to an Order entered on September 21, 1954, by the Legal Ethics Committee, the following Bill of Particulars is hereby furnished:

"1. Copy of the affidavit of Harriet Bouslog, subscribed and sworn to before a notary public on the first day of July, 1953, signed by the Licensee Harriet Bouslog and filed in the United States District Court for the District of Hawaii on July 1, 1953, in the case of United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et al., Defendants, Criminal No. 10,495.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In the Matter of Disciplinary Proceedings against HARRIET BOUSLOG SAWYER, a member of the Territorial Bar of the Territory of Hawaii, *Respondent.*[1]	No. 15,109 June 9, 1958

Appeal from the Supreme Court of Territory of Hawaii

Before: STEPHENS, Chief Judge, and HEALY, POPE, FEE, CHAMBERS, BARNES and HAMLEY, Circuit Judges

CHAMBERS, Circuit Judge:

Harriet Bouslog Sawyer became a member of the Territorial Bar of Hawaii in 1941. Since then, except for four World War II years when she was in Washington, D. C., she has been engaged in the active practice of law at Honolulu. A large part of her work has been in the courtroom. Prior to 1941 she had been admitted to practice in Indiana and Massachusetts.

On August 29, 1951, a federal indictment was returned in Honolulu against Charles Kazuyuki Fujimoto and Jack Wayne Hall and five other residents of the Hawaiian Islands charging

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[1]The proceedings in the Supreme Court of the Territory of Hawaii were entitled "In the Matter of Harriet Bouslog Sawyer, also known as Harriet Bouslog, an attorney at law." In this court, the transcript was printed to indicate Harriet Bouslog Sawyer as appellant and the Bar Association of Hawaii as appellees. The pattern being thus revised, counsel followed it on their respective briefs. This court deems the original entitlement more appropriate and by this opinion restores it with only slight modification.

"'Affidavit of Harriet Bouslog

Territory of Hawaii,
City and County of Honolulu—ss.

I, Harriet Bouslog, being first duly sworn, on oath depose and say:

On Friday evening, June 26, 1953, shortly before 6:00 o'clock I received a telephone call at my home from Ellen Fuller Cabreros, sister of David P. Fuller who sat as a juror in the case of United States v. Fujimoto, et al. Mrs. Cabreros asked me if I could come and see her brother; that he was seriously ill.

I went to the Fuller home at 1734 Colburn Street and was taken by Mrs. Cabreros and Mrs. Fuller into the front bedroom where Mr. Fuller was lying in bed. He appeared to be gravely ill.

I talked with his wife, Helen Fuller, in the living room of their home in the presence of Ellen Fuller Cabreros and her friend, Grace Oshiro, and two of the Fuller children. All members of the family present were upset and in tears at the state of Mr. Fuller. Mrs. Fuller stated that she had called a doctor to examine her husband and informed me that her husband had been ill since the return of the verdict, and particularly since early in the morning of Saturday, June 20, 1953, the morning after the verdict was returned.

Mrs. Fuller said that on Saturday morning, the day immediately following the verdict of guilty in the Smith Act case, at about five o'clock in the morning, she found her husband on his knees praying, begging God for mercy, saying he had sinned, that he had lied in the eyes of God; that Jack Hall was innocent and the case was a frame-up; that Jack Hall is a good man; that those people are doing good for humanity and here someone is trying to block them. She said that in the time since, her husband had told her that the jury only looked at the Government's case and scarcely talked at all about the defendant's side and their case; that he asked her and the children to forgive him because he had done something wrong and it was too late; he said that one of the jurors said the defendants were innocent, and when

the other jurors said, 'Guilty, guilty,' that juror threw a book across the room and said they just as well forget about it. Mrs. Fuller said that her husband had wanted to go see the Judge and confess that he had lied, and once or twice tried to leave the house but was too upset mentally and physically and unable to leave the house by himself; that he fell and struck his head. She said that she and other members of her family urged him not to do anything, not to go to see the Judge and to forget about it, that he would only get himself in trouble and would get them in trouble, and that he might go to jail.

Mrs. Fuller said that when he tried to leave and was unable to, she and other members of the family put him back in bed and tried to keep him quiet; that he kept shouting and crying and praying saying that the case was a frame-up, that he had done wrong, and told the children and her to stay away from him because he was not clean. She said that his condition seemed to get worse and worse as the days went by until on Friday, June 26, 1953, all day he was in bed and did not move or get up at all, and his voice became scarcely a whisper because he was hoarse from the shouting on previous days.

After the conversation with Mrs. Fuller, I went in the bedroom where Mr. Fuller was and asked him if he wished a drink of water. He nodded that he did. During this time, Mrs. Fuller, his sister and her friend were present in the room. Mr. Fuller struggled to talk and make himself heard but because of his weakened physical condition and the loss of his voice, it was difficult to understand what he said. He stated understandably, however, that he wanted help and wanted to get a clear conscience and get the wrong he had done straightened out.

Shortly after my arrival, a Doctor Chang arrived. I was not present in the bedroom during the conversation between Dr. Chang and Mrs. Fuller, although I could hear the conversation between Dr. Chang and Mrs. Fuller from the living room. After Dr. Chang had talked to Mrs. Fuller, Mrs. Fuller told me that the doctor said after examining her husband that there was nothing physically wrong with him, that

he would have to rest in bed, and that it might be necessary to take him to a hospital unless he would get up to go to the bathroom.

After the doctor had left, in the presence of Mrs. Fuller, Mrs. Cabreros and her friend, Grace Oshiro, and Mrs. Fuller's eldest daughter, I gave Mr. Fuller water and he was propped up in bed. Again he tried to talk but seemed to find difficulty in doing so. He said he wanted to talk about the matter and would talk to Jack Hall or anyone at any time to get a clear conscience.

Shortly after this I left, believing Mr. Fuller needed rest. I made arrangements with Mrs. Fuller and Mr. Fuller to come to see him the next day with Jack Hall.

On Saturday morning I was informed by Mrs. Cabreros that her brother was feeling considerably better and wanted to and would be able to see us.

When Mr. Hall and I arrived at the Fuller home about 1:00 o'clock Saturday afternoon, June 27, Mr. Hall put out his hand to Mr. Fuller, Mr. Fuller looked at Mr. Hall for a long time and finally took his hand. Mr. Hall told Mr. Fuller he did not hold anything against him; that he just wanted Mr. Fuller to get well.

Mr. Fuller said to Mr. Hall that from the talk of guilty by other jurors in the jury room, he believed he had to vote guilty to protect his brothers because he was afraid they would be fired if he did not. Mrs. Fuller said that both of Mr. Fuller's brothers, Leonore and Harry, worked for Isle-Ways. Mrs. Fuller said that it wasn't right that they only looked at Government exhibits and not at the defendants' exhibits or case. He said it was a frame-up and said he blamed himself. He said that they looked at Government exhibits and any time someone suggested looked at defense exhibits some juror would say, "Later, later," and they never got around to it. He said that he knew and believed the defendants were innocent all the time but was afraid of what would happen if he voted not guilty.

He said that the jury in their deliberations decided that the Communist Party was a conspiracy within the first hour

after they began their deliberations. He said that the instruction of the Judge which they used to decide this was the one which told them first to decide whether there was a conspiracy, and they decided the Communist Party was a conspiracy. He said he knew from what he heard the defendants were convicted before the case started on ideas the jurors had before the case started. He said he heard two jurors tell the Judge that they were opposed to Communism during the examination. He said that no secret ballots were taken, so everyone knew how each juror voted. He said some of the jurors said the Government wouldn't bring the charge if it wasn't true. He said that at some time he heard it said that if the defendants weren't convicted it would affect Hawaii's getting statehood. He said that the jurors on the side of the Government said that anybody who was a member of the Communist Party must know what its purposes are and are guilty.

He said that the jury wanted Kawano's testimony. He said that jurors on the defense side asked for Kawano's testimony to show that none of the defendants ever talked about overthrowing or destroying the government.

He said that the juror said a number of times during the deliberations that he had to go to the Mainland and that they should get it over with.

He said that if he voted for the defendants he was afraid the other jurors would tell about it and it would hurt his family. He said one of the jurors played cards in the jury room. He said that there was anger and shouting in the jury room between the persons who were for the prosecution and those who were for the defense. Particularly the jurors for the prosecution got angry with the ones who were holding out.

He said they didn't take any secret ballot, but anybody on the defendants' side had to speak up and then the others would try to get them to back down. He said that he heard jurors talk about Attorney Gladstein and said he was too smart and that he had defended the Communists in New York and had served a jail sentence. He said that he heard some of the jurors talk about the war against Communism.

He said that they didn't consider the character evidence for the defendants.

He said the second thing the jury decided was that all defendants were members of the Communist Party. The next thing they decided was that if they were Communists they must have intended to overthrow the government. He said that he himself did not believe Kawano and he heard others say they did not believe Muller. He said that after they asked for the instructions they used the one which told them to decide first whether there was a conspiracy, and right off they decided there was, and then talked about whether defendants were members of the Communist Party. He said there was a lot of talk about Bailey.

After this conversation took place, when Jack Hall and I started to leave, Mr. Fuller begged Mr. Hall not to leave and raised his hands above his head and appeared to be praying although the words were not audible. Before leaving, Mr. Hall tried to quiet Mr. Fuller and helped Mrs. Fuller put her husband in bed.

Mr. Hall and I again went to see Mr. Fuller on Sunday, June 28, shortly after 1:00 o'clock in the afternoon. We were accompanied on this occasion by Joseph Kealalio. When we arrived, Mr. Fuller was sitting in a chair in the living room. He kept looking at Mr. Hall but did not speak.

After conversing with Mrs. Fuller for a very short period of time, we came to the conclusion that it would be better to wait until Mr. Fuller was in better physical and mental condition.

When Mr. Hall started to leave, Mr. Fuller again pleaded with him not to leave.

Further affiant saith not.

/s/ HARRIET BOUSLOG.

Subscribed and sworn to before me this 1st day of July, 1953.

[Seal] /s/ J. D. MARQUES,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires July 15/53.' "

"The Complainant Bar Association neither affirms nor denies the truth or falsity of the allegations and facts contained in the affidavit filed by the Licensee Harriet Bouslog. The Complainant informs the Committee that the above-recited affidavit, its contents, and the manner in which it was obtained furnishes the basis for the charge against the Licensee Harriet Bouslog and that the Complainant will introduce evidence in elaboration of and in corroboration of the charge indicating a failure by the Licensee Harriet Bouslog to comply with standards of professional conduct required of practitioners before this Court and which unprofessional and unethical conduct is condemned in Opinion 109 issued March 10, 1934, by the Committee on Professional Ethics and Grievances by the American Bar Association and by Judge Prettyman in the case of Rakes v. United States, 169 F.2d at pages 745 and 746 and other related cases."

The committee's hearing commenced on November 24, 1954, and after several adjourned sessions was concluded on December 8, 1954. The committee's report was signed on June 9, 1955, and filed on July 1, 1955. The findings sustained the charges. (This report is hereinafter set forth as Appendix A.) The Supreme Court forthwith issued an order to show cause to Mrs. Sawyer.

After a return on the order to show cause, the Supreme Court determined that the hearing before it should be one de novo. However, it was stipulated that the court should make its determination on the record before the committee. No new evidence was received and that court saw no witnesses as such. The court on April 6, 1956, sustained the charges and entered judgment the same day. The judgment suspended Mrs. Sawyer from practice for the period of one year. The judgment has not yet become effective.[7] The Supreme Court's opinion is reported at 41 Hawaii 270. Express reference is made to that decision. Therein many of the procedural events are listed which are not herein listed.[8]

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[7]A division of this Court, Circuit Judge Lemmon dissenting, on May 23, 1956, granted a stay pending the outcome of the appeal herein.

[8]That court's opinion, which is supported by the record, shows that at every step of the proceedings Mrs. Sawyer was accorded procedural due process. To inquire into procedural due process may well be the limit of the scope of any review that this court of appeals is entitled to

Now, what did Mrs. Sawyer do and say at Honokaa and what did she do when she took and presented her affidavit to the U. S. District Court for the District of Hawaii? The Supreme Court hearing the case on the written record had the same record for investigation as we do; no more. No intendments can be given it on the ground it heard and saw the witnesses in person. But still the record tells a story and a clear story that overwhelmingly preponderates to sustain the charges.

On the Honokaa meeting we quote the newspaper article written by the reporter Yoshio Matsuoka in the next edition of the Hilo Tribune-Herald, a newspaper published at Hilo on the Island of Hawaii. We do not suggest that the respondent is to be disciplined because of or for a newspaper article. However, she might have expected her remarks were such as would be publicized. The reason we quote the story from the newspaper is that the findings of both the committee and the Supreme Court implicitly sustain the accuracy of the published item. So far as applicable to Hall and Mrs. Sawyer, it reads as follows:

> "Smith Act trials are aimed at destroying unions and 'must be stopped,' Jack W. Hall and Harriet Bouslog Sawyer asserted here yesterday.
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> "Mr. Hall, ILWU regional director now on trial on Smith Act charges and Mrs. Sawyer, an ILWU attorney, addressed an estimated 230 persons in the People's theater.
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> "Sponsored by the ILWU unity defense committee, it was one of a planned series of a such meetings to tell communities the 'true facts' of the case since sponsors alleged newspapers cannot be depended upon to tell the facts.
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> "Mr. Hall, speaking for 15 minutes, claimed it was the opinion of the working press in the trial that if the trial were stopped now, the defendants would be acquitted.
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> "He declared the prosecution has presented no evidence against the defendants in six weeks of trial and quoted un-

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make on this type of an appeal. Indeed, one finds in appellant's specifications of error a canting of them in the language of procedural due process, as if counsel were well aware of this possibility.

named 'reporters' as saying 'if this is all the government has, what kind of case is this?'

"No jury in the islands would convict on such evidence, he said, and added he was 'certain' there are 'some courageous people' in the jury.

"He characterized some of the 'things that go on' at the trial as 'unbelievable' and 'frightening.' He said such trials 'can' be stopped and have to be stopped' to halt further 'scare prosecution directed against our union and its members.'

"Mrs. Sawyer, speaking for a half hour, spoke of 'some rather shocking and horrible things that go on at the trial.'

"There's 'no such thing as a fair trial in a Smith act case,' she charged. 'All rules of evidence . . . have to be scrapped or the government can't make a case.'

"They 'just make up the rules as they go along,' she told her listeners.

"Unless we stop the Smith act trial in its tracks here' there will be a 'new crime,' that of knowing what's in books and will lead to 'dark ages of thought control,' asserted the chic and attractive woman lawyer.

"She referred to reading by the prosecution of books 'supposed to have been in a duffel bag' owned by a witness, Henry Johnson. She urged her listeners to tell others 'what a vicious thing the Smith Act is.' Persons are 'tried for books written years ago' by others, she said.

"Mr. Hall said Mr. Johnson was a witness 'just so the government can read a bunch of books.'"

As witnesses, the bar association presented the newspaper reporter and seven other people who were in the audience. Matsuoka had not his original notes of the meeting but did have an expanded version he had made within a few days after the incident from his original notes at the request of the newspaper's editor. These notes were admissible as recorded past recollection. (The notes are set forth as Appendix B.) The association's witnesses from the general audience seem to have been timid and

of course there had been a period of 23 months between the incident and their testimony. These people did not impeach Matsuoka, but substantially corroborated him. The meeting was largely made up of persons in the I.L.W.U. with which organization Mrs. Sawyer was closely associated. We find great significance in the fact that she produced not a single member of the audience to confirm her version. Of the eight other speakers, she brought only the defendant Jack Wayne Hall to testify in her behalf. We think it is not to oversimplify if we say the substance of the testimony of Hall and Mrs. Sawyer as to the event of Honokaa was that her speech was just generalities, a shotgun attack on the Smith Act in general. Generally, the two were very evasive. Hall's explanation was most suave but is unconvincing even on paper. If their versions were accepted, their speeches were strictly professorial or something like that of a Sunday School teacher explaining to her class what they would see just before she took the class into a courtroom.

It seems clear enough that she said at Honokaa:

1. That horrible and shocking things were going on at the current Smith Act trial in Honolulu.

2. That the trial was not a fair one.

3. That "they" just made up the rules as "they" went along.

4. That unless the Smith Act trial at Honolulu was stopped in its tracks there would be a new crime—people will be charged with knowing what is included in books.

With great deftness Mrs. Sawyer's counsel interweave the defense versions of the testimony into the bar association's evidence pointing the other way. They argue that her talk was just general, couldn't have been anything else, and specifically did not refer to the trial before Judge Wiig or to Judge Wiig.[9] Without quoting the record extensively, we say the short way (but not the only way) to negative this contention is to quote a statement

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[9]Counsel for respondent in their reply brief insist they don't dispute that Mrs. Sawyer spoke at Honokaa concerning the Honolulu trial. But a fair characterization of the opening brief is that it says, "Mrs. Sawyer didn't really say much about the Honolulu trial, and that was of no consequence."

(during the course of the hearings) by Mr. J. Garner Anthony, able counsel who represented her before the committee:

> "Mr. Anthony. I will say to the Committee right now—I have read these speeches and I would agree with the conclusion implicit in Mr. Dodge's question, namely that this was a talk about what was going on in the Smith Act trial here in Honolulu. Now let's not fool ourselves about that. We're lawyers here."

In context, when Mr. Anthony says, "This was a talk," he was referring to the Honokaa speech.

It is quite true that Mrs. Sawyer's harsh comments did not incorporate Judge Wiig by name. On this circumstance the respondent relies heavily. But there is a totality about a trial, a unit of the judicial process, which is entitled to protection from those who get their license from a judicial temple, especially those who are engaged in the particular trial. During its progress the courtroom is the only proper forum for a lawyer to vindicate his clients. We cannot accept the plea that Judge Wiig was not called by name or identified as thin and six-feet-two. Such a thought is really one that the judge's person, not what he represents, is entitled to protection.

Far different is this from the contempt cases of the Times-Mirror with its editorials and Bridges with his telegram.[10] This is not a contempt case. The Times and Bridges were not court officers charged with the duty of keeping the temple clean. Nor was this a case of a lawyer unconnected with the case commenting at a public meeting or a lawyer who had carried his case past the point of decision, now carrying his cause to the people. Nor was it private grousing among friends to which we assume all lawyers are entitled when legal events are not going their way. It was a public meeting.

We reject the clear and present danger rule of third party contempts which is called upon in Bridges v. California. How could we accept the notion that before a lawyer in the very same case could be disciplined his voice would have to rise to a mighty cacophony reaching the point of causing the audience

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[10]Bridges v. California, 314 U.S. 252.

(a clear and present danger) to march on the courthouse, or to set up such a howl that the judge would be terrified? Maybe for others, but not for counsel of record.

Nor is this a case of a lawyer under strain making an ill-advised speech who later in calmer moments appreciates his error and is humble about it. Respondent is adamant that she only exercised her constitutional right. So, on that she stands or falls. In our view, she falls.

Seriatim we note respondent's points:

1. The specification that Territorial Statute (Section 9701, Re. Laws, Hawaii, 1945) was applied by the court below,[11] so as to deprive appellant of liberty and property without due process of law.

(a) The findings and conclusions are wholly without evidentiary support and unreasonable inferences from the evidence.

(b) Respondent was arbitrarily singled out and adjudged by standards of misconduct other than the usual accepted standards of American Law.

(c) Respondent was arbitrarily singled out and adjudged by standards of proof other than the usual and accepted standards of clear and convincing evidence.

As to this point, with its three subdivisions, our idea is that, respondent's present view of the evidence just isn't correct. And upon her view of the evidence her challenge rests. Respondent overly dissects the evidence and puts too innocent a gloss on it. We find the evidence as a whole amply and adequately justifies

[11] "Section 9701. Qualifications. The Supreme Court shall have the power to examine, admit and reinstate as practitioners in the courts of record such persons of good moral character who are citizens of the United States of America, and who have taken the prescribed oath of office, as it may find qualified for that purpose, but no person shall be examined, admitted or reinstated unless he is qualified under the Hawaiian Organic Act to vote in the Territory of Hawaii and shall have actually registered as such voter; and the Supreme Court shall have the sole power to revoke or suspend the license of any such practitioners or to dismiss or suspend them from the roll of practitioners for malpractice, fraud, deceit or other gross misconduct."

the findings and conclusions. We see no evidence that respondent was arbitrarily singled out.

On subdivision (b) of the point respondent quotes Circuit Judge Soper in In Re Ades (D.C. Md.), 6 F. Supp. 467 at 481, as follows:

> "An attorney does not surrender, in assuming the important place accorded to him in the administration of justice, his right as a citizen to criticize the decisions of the courts in a fair and respectful manner, and the independence of the bar, as well as of the judiciary, has always been encouraged by the courts."

Also, Ex Parte Steinman, 95 Pa. 220, 238, 40 Am. Rep. 637, is quoted:

> "Because a man is a member of the bar, the court will not, under the guise of disciplinary proceedings, deprive him of any part of that freedom of speech which he possesses as a citizen. The acts and decisions of the courts of this state, in cases that have reached final determination, are not exempt from fair and honest comment and criticism. It is only when an attorney transcends the limits of legitimate criticism that he will be held responsible for an abuse of his liberty of speech. We well understand that an independent bar, as well as an independent court, is always a vigilant defender of civil rights." (In re Troy, 43 R. I. 279, 291, 111 Atl. 723, 727-728.)

These cases themselves turn on respondent. Note that Judge Soper says an attorney has the right to criticize "the decisions" of the courts in "a fair and respectful manner." Note that Ex Parte Steinman[12] says, "The acts and decisions of the courts of this state in cases that have reached final determination, are not exempt from fair and honest comment and criticism." This subdivision (b) falls entirely when one reaches the conclusion that the comment was unseemly and certainly at the wrong time.

As to subdivision (c), respondent relies heavily, among other things, upon statements of Professor Rodell of the Yale Law

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[12]Cf. In Re Breen, 30 Nev. 164, 93 P. 997.

School and again upon her most favorable view of the evidence. We would uphold Professor Rodell's right to say from his Yale vantage point just about what he wants to say. But when he speaks he is not simultaneously harassing the very court in which he is trying an unfinished case. Remove respondent's innocent view of the evidence and again the point is without significance.

2. The point that "the statute, inherently and as applied, without appropriate standards, deprives petitioner of freedom of expression contrary to the provisions of the first and fifth amendments. So construed and applied, the statute in operation and effect creates a prior restraint and censorial control over the public utterances of lawyers in derogation of the independence of the bar and the due administration of justice."

We are not familiar with any law that requires a statute for the discipline of lawyers to categorize in detail the lawyer canons. Further, we see no contravention of the first and fifth amendments. When one concludes that during the trial the lawyer of record is under restraints not applicable to the public in general, and perhaps not even applicable to the defendant, the point is answered.

The sub-point listed on the sixth amendment: "To have (that is, a defendant) the assistance of counsel for his defense," we hold has no merit. To be fearless, is not to lay down by night a barrage on the court. Such conduct is the antithesis of bravery or "the assistance of counsel." The sixth amendment does not say such counsel can be entirely uninhibited. Here again on this point (2) respondent's own view of the evidence is the projection from which the respondent makes her argument.

3. The third point is: "The judgment of the territorial court was beyond its jurisdiction and contrary to sound policy governing the relations between local and federal courts because it creates a standard of conduct intimately affecting the administration of justice in the latter. In reviewing that judgment this court will make its own evaluation of the facts and determine its own standard."

In short, the point says: Whatever Mrs. Sawyer did was none of the business of the territorial court because the conduct con-

cerned—the federal court. But the state (here the territory) is the primary jurisdiction that sponsors a lawyer, that mainly presents him to the public. It has an interest. Even had the conduct been in open federal court, still the state has an interest. See In Re Isserman, 9 N.J. 269, 87 Atl.2d 903. Cases may arise like the Isserman type in which the state will feel it should stand by and let the matter be entirely handled on the federal side of the street. But that lends no support for an argument that we should say a state or territory cannot act. Rather should the territory be commended than chided.

Point five is that the judgment of the Territorial Supreme Court is arbitrary and excessive. This last point must necessarily assume that the conduct was relatively innocuous. Respondent was an officer of the court. The term has vitality and is not a transparent euphemism.

In all facets of this case in this court there has been the spectre of jurisdiction. This court does not have general jurisdiction to review the work of the territorial courts of Hawaii.[13] Our only scope is narrowly defined by statute. We do not have the plenary powers here that we might naturally have in such cases as Lavine's, 9 Cir., 217 F.2d 190.

If we have the jurisdiction it hangs by the narrowest thread. We think on the line of such cases as Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232, and Konigsberg v. State Bar of California, 353 U.S. 252,[14] when the charge is made that respondent has been deprived of due process of law under the fifth amendment and that the result impinges on her rights under the first amendment, we are justified in taking the case to look at it to see if the claims of such

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[13]See 28 U.S.C.A. §1293

"Final decision of Puerto Rico and Hawaii Supreme Courts

"The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs."

[14]Cf. Bell v. Hood, 327 U.S. 678.

deprivation have any validity. In that sense we have jurisdiction. Then we take the case and, in our view, we find that there was no deprivation of constitutional rights. Thus we complete the chain, and one can then logically argue: therefore we never had jurisdiction.[15] On the whole, after examining the record it is our view that the respondent's position basically has little right to be more than a claim that the territorial court took a different view of the evidence than hers and the judgment is a little too harsh. Such claims we wouldn't hear. So, within the limits of permissible advocacy, we suppose, we find the claims on appeal expanded to include claims of deprivation of constitutional rights, claims which we hold are not solid.

On the second segment of the case, the Fuller affidavit, Mrs. Sawyer's counsel meet it by ignoring it completely in their opening brief. Finally, in their closing brief they say that it is moot because the Supreme Court imposed no punishment thereon. As to that point, we cannot agree. The court at page 426 of its opinion in the Hawaii reports (having first announced the suspension of one year in consequence of the Honokaa speech) then proceeded to the matters incident to the Fuller affidavit and finally concluded with:

> "However, in the instant matter, this court will let its hereinbefore expressed disciplinary order suspending the said respondent licensee from the practice in the territorial courts for one year and requiring her to pay costs—suffice, although also deeming gross misconduct her said repeated interviews with and interrogations of David Fuller."

To us this is a statement that the penalty for the two charges is imposed concurrently—the same penalty for both charges. However, there is a tinge in the pronouncement which possibly indicates that had the Fuller charge been before it alone it might have not imposed a full year's suspension on that charge; we do not know. If we were reversing the case on the findings and penalty on the first charge, we would (because the matter is not clear) refer the matter back to the territorial court to de-

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[15]Cf. Theard v. United States, 354 U.S. 278, 281.

termine clearly and anew what sanction it intended to apply on the second charge.

The evidence sustains the second charge as appears from the findings of the court's committee and the court itself to which reference is made. It is quite evident, however, that on the second charge alone the respondent would not be able to maintain intact, without breaking, the very thin thread on which we have held there are points which give us the jurisdiction to test the record.

Appellant contends that her punishment applies a different standard to her than has been applied to other lawyers in Territory and that the penalty is too severe; that instead of automatic reinstatement at the end of a year she will have to apply anew—be investigated and take the regular bar examination. Circuit Judge McKinley, sitting pro tem on the Supreme Court, voted for disbarment. That would have been permissible, we think. Many disbarred attorneys become reoriented and again make their way back into the bar.

If the respondent should show some genuine remorse and some appreciation of her error, it might be that the Supreme Court of Hawaii would ameliorate its decision. But so long as she conceives that she has a right to litigate in a given case by day and castigate by night (or at recess) the very court, the honored place in which she is working, berating the conduct of the trial which she will resume on the morrow, she does not deserve to practice law.[16]

We find applicable here much that is said in In Re Howell, 10 N.J. 139, 89 A.2d 652. There Attorney Howell under great provocation by a newspaper editor sought the editor out and severely beat him with both a riding crop and a rubber hose. This was conduct far removed from litigation. The court, per

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[16]Mr. Justice Cardozo when on the New York Court of Appeals said, "Membership in the bar is a privilege burdened with conditions (Matter of Rouss, 221 N.Y. 81, 84, 116 NE 782). The appellant was received into the ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." People ex rel. Karlin v. Culkin, 248 N.Y. 465, 162 NE 487.

curiam, quotes Canon 29 of the Canons of Professional Ethics of the American Bar Association to the effect that a lawyer "should strive at all times to uphold the honor and maintain the dignity of the profession and to improve not only the law but the administration of justice." The court continued, "An attorney's responsibility is to the courts, the profession and the public and his misconduct may be of such a nature as to engender disrespect for the law which is his basic trust."

Mr. Justice Brennan, then of the Supreme Court of New Jersey and now of the Supreme Court of the United States, wrote a concurring opinion in the Howell case in which Chief Justice Vanderbilt joined. In it he said,

> "We are a society governed by law, whose integrity it is the lawyer's special role to guard and champion. In that society there is no place for a personal code of justice. The preamble to the Canons of Professional Ethics observes 'The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.' Canon 29 obligates every member of the bar to 'strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.' * * * His office is a very badge of respectability and his conduct sullies the office. He 'invites and merits stern and just condemnation.' Cf. Canon 32. His conduct perforce imperils not him alone but the honor and integrity of his profession which depends for its very existence upon public trust and confidence.' * * * Discipline must be imposed not primarily to punish him but to give assurance to the public that the profession is deserving of its trust and confidence and will demand that all lawyers meticulously adhere to the high standards imposed by the profession upon itself."

It is true that Lawyer Howell had entered a *non vult* or *nolo contendere* plea in a trial court to a charge of simple assault and battery; thus the doing of a criminal act was implicitly conceded. But we would think simple assault and battery was

a crime not involving moral turpitude per se. The New Jersey Supreme Court had to go on and examine de novo the special facts of the case, and it did.

Here in Mrs. Sawyer's case the Supreme Court's findings bring us to the same point: she did that with which she was charged. And it should be noted that Howell was abject in admitting his error. Notwithstanding his contrition, the court suspended him from the practice of his profession for six months.

Mrs. Sawyer's conduct has neither the ameliorating circumstance of Howell's rage being instantaneous with perhaps great provocation (and, with only 40 minutes to cool down), nor of his later recognition of his error.

We agree that the censured conduct of respondent was grossly improper.

Judgment affirmed.[17]

In the Matter of Disciplinary Proceedings against Harriet Bouslog Sawyer, a member of the Territorial Bar of the Territory of Hawaii, No. 15,109.

APPENDIX A

REPORT OF LEGAL ETHICS COMMITTEE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the Territory of Hawaii:

The Legal Ethics Committee, pursuant to a letter from the Honorable Edward A. Towse, dated July 8, 1954, has investigated a complaint filed by the Bar Association of Hawaii and makes this report of the charges, facts and conclusions of the Committee pursuant to Rule 19.

The Charges:

The two charges made in this complaint have to do with (1) the alleged improper conduct of Mrs. Harriet Bouslog Sawyer, re-

[17]Circuit Judge Denman, then Chief Judge, presided at the oral arguments of the foregoing case heard en banc. Between the date of hearing and the date of decision he retired. He now deems it inappropriate that he participate in the en banc decision. Circuit Judge Lemmon heard the oral arguments, but his death occurred on April 26, 1958.

ferred to in this report as "Mrs. Bouslog," in making a speech at Honokaa, Hawaii, on December 14, 1952, and (2) the alleged imprdper conduct in connection with her interview of the juror David P. Fuller, as more fully set forth in the Bill of Partieulars dated September 29, 1954.

The Facts:

The Committee finds that Mrs. Bouslog was one of the attorneys appearing for certain defendants in the United States District Court for the District of Hawaii entitled "United States of America, Plaintiff, against Charles Kazuyuki Fujimoto, et als., Defendants," being Criminal 10495 in that Court; that on December 14, 1952, during the course of the trial, she made a speech at a public gathering at Honokaa, at which she said, among other things, that horrible and shocking things were going on at the trial; that there was no fair trial in the case; that they just made up the rules as they went along; that unless the Smith Act trial was stopped in its tracks in Honolulu there would be a new crime.

With respect to the charges in paragraph III, the Committee finds that after rendition of the verdict in Criminal 10495, mentioned above, Mrs. Bouslog visited one of the jurors, David P. Fuller, Jr., while he was in a very poor mental and physical condition and thereafter submitted her affidavit concerning an interview with the juror to the Presiding Judge.

While the affidavit of Mrs. Bouslog indicates that on the first occasion he was gravely ill, the Committee finds that she did not fully disclose to the Court the condition of Mr. Fuller, nor the fact that she had attempted to get affidavits from Mrs. Fuller, who refused to sign one, and could not get an affidavit from Mr. Fuller because of his condition.

Conclusions and Recommendations:

The Committee is of the unanimous opinion that the Bar Association of Hawaii has sustained the allegations in paragraphs II and III of its complaint and that Mrs. Bouslog, in imputing to the Judge unfairness in the conduct of the trial, in impugning the integrity of the local Federal courts and in other comments

made at Honokaa, was guilty of violation of Canons 1 and 22 of the Canons of Professional Ethics of the American Bar Association and should be disciplined for the same.

The Committee is likewise of the unanimous opinion that it was improper for her to submit her affidavit concerning the interview with the juror Fuller to the Presiding Judge under the circumstances under which it was submitted. There are differences of opinion within the Committee as to whether her interviews with juror Fuller were proper, as to whether they were in violation of Canon 23 of the Canons of Ethics and as to whether she should be disciplined, although the majority think she should be disciplined with respect to the charges in paragraph III.

Dated: Honolulu, Hawaii, June 9, 1955.

Respectfully submitted,

/s/ C. DUDLEY PRATT,
Chairman;
/s/ MILTON RODES,
/s/ CLIFTON H. TRACY,
/s/ E. C. PETERS,
/s/ [Indistinguishable],
Of the Legal Ethics
Committee.

I concur in the findings of the Committee that the conduct of the respondent was, with respect to the Honokaa speech and with respect to the matters concerning the juror, improper.

I do not concur in the conclusion that the other members of the Committee have reached with respect to the recommendations we should make to the Court.

This is a proceeding under Rule 19 of the Rules of the Supreme Court. This Committee's authority to act and its duties are set forth in that Rule.

> On completion of the hearing the Committee shall file with the Court its findings of fact, conclusions of law *and recommendations as to action to be taken* by the Court in the matter * * *

I do not believe the italicized words mean only that this Committee should merely recommend that disciplinary action should or should not be taken. I believe that the Rule means that this Committee has a duty to go further and recommend the nature of the discipline it feels is proper.

I would recommend that, for the improper conduct of Mrs. Bouslog with reference to the Honokaa speech, she be suspended from the practice of law for such period of time as the Court may deem just and proper. I believe this to be by far the more serious of the two charges.

I would recommend that, for the conduct regarding the juror which this Committee has found to be improper, she be reprimanded.

Dated: Honolulu, T. H., June 9th, 1955.

/s/ R. G. DODGE.

[Endorsed]: Filed July 1, 1955.

APPENDIX B

Matsuoka's "Notes".

Notes on Mrs. Harriet Bouslog Sawyer's speech at People's theater, Honokaa, Sunday, December 14.

She followed Samuel M. Bento, who said he wanted to say good morning to the Tribune-Herald, pointing generally toward the paper's reporter from Hilo and the paper's Honokaa correspondent who were sitting side by side. Mrs. Sawyer preceded Jack W. Hall. She began speaking at 11 a.m. and ended 11:30 a.m.

Notes on what she said in the order of how she proceeded: The trial is really a trial of Jack Hall to which has been added six others. It's to get at the ILWU.

Said she wanted to tell about some rather shocking and horrible things that go on at the trial.

She was appointed some years ago (3 or 4 years ago) by a court to defend a man who had no money to hire his own counsel. He

was charged with pimping and procuring. The complaining witness in the case was a woman who had been in business 20 years in the territory who claimed she had reformed and repented but this vicious man had driven her back again into the business. It turned out that the hotel where he had kept her had 27 doors unlocked. Likened this to pukas in the Smith act.

Said men in power are trying to put men in jail because of their thoughts. and books written before he was born.

One of the reasons Jack Hall is on trial is because it is said he once got a book, the Communist Manifesto, written in 1898, before Jack Hall was a gleam in his father's eye.

She quoted from manifesto: a spectre is haunting Europe; the spectre is communism. she explained spectre means ghost. said spectre still seems to be haunting people today.

She turned next to conspiracy. noted there was a conspiracy trial in 1937 of filipino brothers. conspiracy to advocate violence and criminal sindicalism. explained conspiracy means agreement. government never has used conspiracy when it had a case. when it hasn't got enough evidence it lumps a number together and says they agreed to do something. the government does not say . . advocated overthrow but says they agreed to. conspiracy means to charge a lot of people for agreeing to do something you have never done.

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touched on myth of agents of fbi. they're supposed to be extra special. radio programs, movies, publicity tell how wonderful they are. but when you see hundreds of tax fraud cases go by and when they spend most of their time investigating people's minds it's time to cut them down to size. said she had told this to a honolulu gathering. labor day? fbi agents should be called federal cops. said has slogan: put away your thoughts here come the federal cops. cops push people around.

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paul crouch. difficult to understand why he's witness. but he was here in 1924; because he was once in Hawaii, so guess that's why. he testified what he did in russia in 1927. he told what he was told by generals etc. usually you cannot testify on what people told you when there is no chance for those to be cross examined.

aileen fujimoto was four years old then. what has crouch's galloping over the plains of russia got any bearing on her. jack hall was 13. but the government goes on with testimony for two weeks on what crouch did between 1927 and 1941 without ever mentioning the defendants.

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he told of infiltration of the armed forces and plots . . . it used to be the idea that a man is responsible for what he did and said—not what someone else did. not a single one of the defendants was of age at the time he's talking about. the jury is not going to pay attention to what Crouch says. but it's the old smear. The prosecution says crouch did this and that and we (prosecution) say the defendants are communist party members so they must have done the same.
but government propaganda has been going on for 10 years before the jurors went into the jury box.

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it's enough to say a person is a communist to cook his goose.
the government says there was an agreement to violate the smith act which was passed in 1940. then the defendants agreed to violate it before it was passed. crouch said he was at a communist meeting in 1941 and saw five or six people there. it was the first time he'd seen them. but he was satisfied when he came to honolulu 12 years later that one was Koji Ariyoshi. she urged audience try to recall what they did 12 years ago. said she can't recall details. god knows no one has a memory that good. yet they use this kind of testimony.

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why? because they will do anything and everything necessary to convict.
some of the witnesses testified differently from what they testified previously. the government knows this but deliberately goes ahead and have him say things in order to convict. mentioned izuka in reinecke trial testimony. said something about izuka saying he didn't know the party advocated overthrow of government until he got out of party.
witnesses testify what government tells them to. just as they read portions of books like overthrow the government and leave

out the rest which says czarist government showing it dealt with russia.

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johnson testimony. said he came back from san francisco with communist hooks and literature in a duffle bag. he said when he got to Honolulu he told Jack Hall the names of some of the books. then the government for two days reads from books supposed to have been in the duffel bag. they're not dealing with what jack hall said. on cross examination johnson said he did not tell the names of the books but just showed jack hall the duffel bag. so jack hall violated the smith act because he saw a duffel bag with some books on overthrowing the government in it. it's silly. why does the government use your money and mine to put people in jail for thoughts

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the government has carried on a barrage of propaganda for many years and expects people in the jury to have hysteria just hearing about communism is enough to jail. said has a friend who worked for sears roebuck and has family of three children and wife. he made a terrible mistake one time. in 1941 he lived in the same house as jack hall. the fbi wanted him to testify. he said i feel jack hall is one of the finest people i have known. apparently the fbi didn't like this. so they suggested to sears and roebuck to fire him because he wouldn't cooperate with the government.

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he wasn't fired so they went to the Los Angeles and Chicago offices of sears and roebuck and convinced them he had to be fired. he was fired because he refused to be a stool pigeon and informer. the government gets away with it by making people fear that if they don't do as it wants they'll be branded red and lose their jobs.

there's no such thing as a fair trial in a smith act case. all rules of evidence have to be scrapped or the government can't make a case.

referred to her habeas corpus move in the palakiko—majors case.

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said a woman came to her with report she heard vernon stevens say he bet a confession out of one of them. she testified but the supreme court refused to let the evidence in because vernon

stevens was not here and had no chance to deny this. with the same situation a federal judge sitting on a federal bench permits crouch to testify about 27 years ago. what was said then. in the previous case it was the life and death of one. and yet here they permit a witness to tell what was said when a defendant was five years old.

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there's no fair trial in the case. they just make up the rules as they go along. the first smith act case was in 1949 of the new york top leaders. attorneys contended they should have the right to say what they did from 1924. medina permitted them to say what the defendants themselves did from 1934 on. but the government can't make a case if it tells just what they did so they widened the rules and tell what other people did years ago, including everything including the kitchen sink.

unless we stop the smith trial in its tracks here there will be a new crime. people will be charged with knowing what is included in books. ideas.

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mentioned los angeles trial in which someone said there was no evidence that someone had instructed persons not to read some books.

said there'll come a time when the only thing to do is to keep your children from learning how to read. then not only will unions be destroyed by so will freedom of thoughts and action. there'll be dark ages of thought control when people won't be able to speak freely in taverns and other places.

she urged audience to go out and explain what a vicious thing the smith act is. people are tried for books written years ago.

APPENDIX C

The Sawyer Explanation to District Judge Wiig
Extract from Transcript of Proceedings in United States v. Fujimoto.

Afternoon Session—December 16, 1952
(The Court convened at 1:15 p.m.)

(Jury absent.)

The Court: Mrs. Bouslog, when were you admitted to practice in this Court?

Mrs. Bouslog: In the year 1941, your Honor.

The Court: Do you remember the date?

Mrs. Bouslog: The certificate, your Honor, hangs in my office, but I believe it was some time in December in 1941. I was notified that I had passed the bar examination in the Territory, as I recall, after Pearl Harbor. So I believe it was the latter part of December in the year 1941.

The Court: I have before me a newspaper clipping from the Honolulu Star Bulletin of Yesterday afternoon in which it purports to quote statements made by you on December 14, 1952, at Honokaa, Hawaii, at a meeting. Do you have anything to say as to the newspaper report?

Mrs. Bouslog: I do indeed, your Honor. I want to say that I welcome the opportunity to state to the Court the substance of what was said at that meeting, and I assure your Honor that the excerpts wrested from the context will not reflect the substance of the context of that speech. Of the words, attributed to me in quotes, I recall clearly that I did say, "There is no such thing as a fair trial in a Smith Act case." I explained, your Honor, the reason for that statement. The reason, I said, was that ideas and books are on trial in a Smith Act case, and that years of propaganda which preceded the enforcement of the Smith Act both by the Government and by the Commercial press has created such an atmosphere of hysteria that the very word "Communism" has become such a deadly label that it is almost impossible for jurors to put out of their minds all they have read and heard outside the courtroom. In substance, your Honor, I said in respect to this statement no more than de-

fense counsel said in the motion on file before this Court for a transfer of the place of trial. In substance, I said no more than what Justices Black and Douglas, dissenting, said concerning the Smith Act in the Dennis case.

The balance of the words other than the ones I have just quoted—which I recall clearly having said—the balance of the words attributed to me in quotes, either I did not say or they are so torn from context as to wholly distort my speech as a whole. Apparently Mr. Walsh is not satisfied to try my clients on sentences or parts of paragraphs ripped from context but he desires to try me on sentences, on portions of sentences and words extracted from the context in which they were said. This, I am sure, that this Court will not permit.

My speech was extemporaneous, an extemporaneous speech, your Honor. I have no notes as to the exact words or the full content. Upon learning, however, this morning from my colleagues that your Honor was going to give me an opportunity to state the substance of the remarks which I did make, I dictated to my secretary the substance of the speech.

I began my remarks by explaining what the Smith Act is and how the prosecution goes about trying a Smith Act case, reading excerpts from books that were written many years before the defendants in this case were born. I spoke of the difference between a Smith Act case and the ordinary criminal case in which a person is tried for what he has done, not for what he thinks—what is in his mind. I explained what a conspiracy is and showed how it can be used to charge a group of persons with agreeing to do what the prosecution cannot prove any single individual did.

In this respect, your Honor, my explanation was drawn from the criticism of the Senior Circuit Judges of conspiracy charges which we cited to your Honor in the brief which we filed and indeed quoted the language of the Supreme Court itself on conspiracy and calling it a dragnet.

My remarks at the meeting at Honokaa concerning the rules of evidence were directed towards the conduct of the prosecuting attorneys in Smith Act cases, how they use a conspiracy charge for the very reason that it permits them to introduce evidence that would not be admissible under the ordinary criminal charge.

I said that in Smith Act conspiracy cases the prosecution had gone beyond the scope of the rules of evidence, even in other conspiracy cases. My remarks were no more in substance than has been stated to this Court in the memorandum filed by defense counsel, submitted in support of the motion to strike the entire testimony of the witness Crouch. In fact, your Honor, my objective in the speech at Honokaa was to state in ordinary language that laymen would understand the content of the decisions of the courts cited in that brief.

The second half of my speech—after speaking generally concerning the tactics of the prosecution in the Smith Act cases and the Smith Act—was devoted to a discussion of the evidence on which the prosecution in this case is seeking to convict Jack Hall and the other six defendants in this case. I used several illustrations. One, I used the testimony of Paul Crouch about riding horses on the Russian plains and talking to a Russian general in 1927. I pointed out the defendants couldn't have possibly cross-examined the Russian general, first, because he had been dead for many years, and second, even if he weren't it would probably be impossible since he is a Russian. I pointed out at the time that Paul Crouch was in Russia, Eileen Fujimoto was five years old and Jack Hall, aged thirteen, was just ready to start high school in Southern California. Yet I said Crouch's testimony of his plotting to infiltrate the Armed Forces and to commit acts of espionage and sabotage while in Russia in the year 1927 was being used against the defendants in this case.

Another illustration that I used from this trial was the testimony of Henry Johnson who testified that some time in 1945 or 1946 he showed Jack Hall a duffle bag and told him it contained Marxist literature. That, although Johnson admitted on cross-examination that he didn't tell Jack Hall what books the duffle bag contained, in effect the fact that Jack Hall had seen the duffle bag was used as a basis for introducing numerous books in evidence which Johnson testified the duffle bag contained.

Another illustration I used was that of the testimony of Ichiro Izuka who testified under oath in the Reinecke case that he didn't learn until after he left the Communist Party that it advocated the use of force and violence, and that therefore his testimony was of no value to the prosecution to prove the crime

charged against these defendants but that nevertheless the prosecution called him and used him in this case to testify to matters completely at variance with his sworn testimony in prior cases.

To illustrate the difference between the application of the rules of evidence in ordinary cases and in Smith Act cases, I told how the Supreme Court of the Territory of Hawaii had refused in the Palakiko and Majors case which involved a question of life and death to permit the testimony of Mrs. Frances Hughes of an admission by Detective Vernal Stevens that he had struck Palakiko before he obtained his statement on the technical ground that no foundation was laid because Vernal Stevens was out of the Territory.

Yet in Smith Act cases I pointed out the prosecution puts on witnesses to testify to things that were said and done by third persons not only on the mainland of the United States but in other countries halfway around the world, and even though the defendants here do not know, have never had any contact with the third persons mentioned and never heard of them before this trial.

I closed my case or my speech by saying that a new crime is being created, the crime of reading. I quoted exactly from, to the best of my recollection, from the closing argument to the jury by the prosecution in the Los Angeles case, in which the prosecution said the defendants asked people to read, read, read, and that they never at any time told people not to read anything. I said that if Smith Act prosecutions continue, the only safe thing will be not to know how to read. And that Smith Act prosecutions, unless stopped, will lead to thought control. I said further that the Smith Act can be stopped here in Hawaii if enough people began to understand the danger of such prosecution.

As the Court can see, my remarks were directed towards the conduct of the prosecution and were not directed towards the Court. By that I do not mean to say that the defense counsel in any way recede from the position that was taken in the brief filed in connection with the Crouch testimony, in which we believe we have cited authorities showing that your Honor had admitted evidence which is not admissible even in the ordinary conspiracy case.

I feel, your Honor, that when the words—and you will note in some cases they are single words—are put back into the context of the whole speech that it must be clear to your Honor that there was no contempt of this Court involved in the speech and that the criticism was directed to the conduct of the prosecution in Smith Act cases.

The Court: Before you sit down, I would like to ask you, did you say at that meeting that things go on at the trial, referring to this trial, that are unbelievable and——

Mrs. Bouslog: No, your Honor, that was not even attributed to me, I believe. That, I believe was not attributed to me even in the newspaper account.

The Court: Did you say that some rather shocking and horrible things were going on in this trial?

Mrs. Bouslog: I have no recollection of that statement. I did undertake to explain in factual terms exact testimony that has taken place in this case, of which I gave the four illustrations which I have cited to your Honor. I have no recollection of those words.

The Court: Did you say that all rules of evidence have to be scrapped or the government can't make a case and just make up the rules as they go along, or words to that effect?

Mrs. Bouslog: No, your Honor. I explained in the substance of my speech that I paraphrased for the laymen the rules of evidence contrasted with the kind of offered evidence by the prosecution in Smith Act cases, all of which is set forth in the memorandum to your Honor in which it is shown that there is a great—that the prosecution seeks great leeway from the ordinary rules of evidence.

The Court: You realize that this trial is still pending?

Mrs. Bouslog: Yes, your Honor.

The Court: And has been pending now for six weeks?

Mrs. Bouslog: Yes, your Honor.

The Court: That you are counsel of record?

Mrs. Bouslog: Yes, your Honor. And may I say, your Honor, that I think there is not one word of what I said at Honokaa that is in any way, that in any way shows any contempt for this Court, that my remarks were directed, as I said, primarily to the conduct of the prosecution in a Smith Act case. And, of course,

more learned and more prominent people than I have said much stronger things concerning the techniques of the prosecution in all Smith Act cases beginning with the Dennis case and all of the pending cases. And those remarks in context were directed generally to the Smith Act cases. Only the specific illustrations from this trial related factually to what goes on in this courtroom.

The Court: Well, Mrs. Bouslog, I am not satisfied with your explanations to the Court. I think this matter requires further investigation. I am going to instruct the U. S. Attorney to make a further investigation of this matter and if he finds under the provisions of Rule 42(b), a Notice and Order to Show Cause should issue, then he will do so.

Mrs. Bouslog: I will say to the Court that I am happy to have any investigation made of what I said. I think perhaps that it is rather unfortunate that the Court refers it to the prosecution whose conduct I was criticizing in the case rather than to an impartial person.

The Court: Well, in that respect, Mrs. Bouslog, if you feel that there is any partiality on the part of the U.S. Attorney, I have no reluctance whatsoever to refer the matter to an independent attorney. I think you should know that throughout this trial I have done everything that I could to assure to the defendants a fair trial. Counsel for the defendants naturally have disagreed with me on some of my rulings on evidence. That is only natural. Or the admission of documents in evidence. But in every other matter there has come up since the time the jury was selected, the matter of fair play on giving the defendants the benefit of the doubt, I have almost consistently done so. It is very surprising to me to read this article in the newspaper after one of your associate counsel, Mr. Wirin, took occasion a week or so ago to come to my chambers during a recess and state that he had been advised or had heard—I didn't ask him the source of his information—that Judge Wiig would not give the defendants a fair trial, and he wanted to state to me at that time that in his opinion the defendants were receiving a fair trial. Again, Mrs. Bouslog, I have done everything I could in this trial to prevent any outside influences from entering into the presentation of evidence and the matters that go to the jury. So

when this case is in their hands it will be decided upon the evidence and what has taken place here in the courtroom.

This publication in yesterday afternoon's paper is the first that I have seen which is contrary to what I had hoped for, what I had hoped would continue throughout the trial. The factual reporting of the principal or the Honolulu Advertiser and the Honolulu Star Bulletin had been, I think, fair. I have noticed no editorial comment or other comments which would in any way have an effect upon giving a fair trial to these defendants. And this caused a great deal of concern when it was called to my attention by Mr. Walsh yesterday afternoon. I trust that nothing will happen from here on which will affect this trial in any way. Will you please call the jury?

Mr. Barlow: Am I to understand, your Honor, that I am going ahead with the investigation?

The Court: Yes.

BARNES, Circuit Judge, concurring, in whose concurring opinion Judges Healy, Fee and Chambers concur:

I agree with Judge Chambers in his holding that the respondent's conduct was grossly improper.

Unquestionably, this Court has jurisdiction in this cause where constitutional objections are raised as to a disbarment proceeding, because the question of according due process of law to the lawyer is always involved. Therefore, this Court has the authority to examine the proceedings. The panel which first heard the cause and now the whole court, with one dissenting judge, agree to this proposition.

Due process of law, both substantive and procedural, was accorded. As the opinion of Judge Chambers shows, the Hawaii Bar Association filed with the Supreme Court of Hawaii a complaint against Harriet Bouslog Sawyer, which contained two charges of professional misconduct. Since Mrs. Sawyer was duly and regularly admitted by the Supreme Court, she was an officer of that court and responsible to it for alleged professional misconduct. In accordance with its own Rule 19, that tribunal referred the cause to its Committee on Legal Ethics and Unauthor-

ized Practice for investigation, which required the Bar Association to furnish a bill of particulars. The Committee held several sessions of the hearing and filed a report containing findings sustaining the charges. The Supreme Court issued an order to show cause, which was directed to and served upon Mrs. Sawyer, who filed a return thereto. Thereupon, the Supreme Court held a hearing de novo. Mrs. Sawyer was accorded the right to and did appear at that hearing in person. She was given the opportunity to be heard, and took full advantage of the occasion. Mrs. Sawyer was given the right to be represented by counsel. Eminent and able counsel of unblemished reputation did in fact vigorously represent her.

The record as a whole, at a minimum, shows that there was not only adequate but substantial evidence to sustain a judgment cancelling her license. Furthermore, irrespective of the dissents, we believe the evidence clearly convincing and sufficient to sustain the judgment beyond a reasonable doubt.

The Supreme Court then suspended Mrs. Sawyer from the exercise of her office, which it had conferred upon her "during good behavior," for professional misconduct, ascertained and declared upon adequate and convincing evidence by the judgment of that tribunal after she was afforded opportunity to be heard both personally and by counsel.

The Supreme Court of Hawaii is not a court organized under Article III of the Federal Constitution, but rather under Article IV, section 3, clause 2 of that instrument.[1] The power of Congress to restrict or abrogate appellate review from such a tribunal is paramount.[2] There is doubt whether appellate courts organized under Article III can be constitutionally burdened with

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[1] "* * * the territorial courts are 'legislative' courts, created in virtue of the national sovereignty or under Art. IV, §3, cl. 2, of the Constitution * * *." **O'Donoghue v. United States**, 1933, 289 U.S. 516, 535; **Ex Parte Bakelite Corporation**, 1929, 279 U.S. 438, 449-450; **Mookini v. United States**, 1938, 303 U.S. 201, 205.

[2] **Ex parte Wilder's Steamship Company**, 1902, 183 U.S. 545. Jurisdiction of this Court over certain final decisions of the Supreme Court of Hawaii is conferred by 28 U.S.C.A. § 1293.

review of administrative functions or housekeeping regulations or determination of a legislatively controlled tribunal.[3]

Even in cases where Congress has permitted review of the territorial Supreme Courts, the appellate courts of the judicial system proceed with extreme caution where local customs, practices or the subtle influences or nuances of customary local law may be present.[4] The same caution should be employed in a parallel situation if local custom of a legislative tribunal dictated that its licentiate should not obstruct the course of justice in another court.

I read the original Matsuoka notes (not the newspaper story thereafter written) as a direct attack upon Judge Wiig's conduct of the trial and his rulings therein; that Mrs. Sawyer charged that "this" was not a fair trial; that Judge Wiig's rulings on evidentiary matters were unfair; that Judge Wiig, with the government prosecutors, "make up the rules as they go along;" that in this case all rules of evidence were "scrapped;" that the conduct of this Smith Act trial was a crime that had to be stopped. How such charges can be characterized as being "devoid of any attack upon Judge Wiig or his Court," or to constitute "not even a scintilla of evidence" of an attack upon the integrity of Judge Wiig, as does my brother, Judge Pope, is beyond my powers of comprehension.

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[3] "* * * this 'Constitutional' court * * * is empowered to act only in justiciable 'cases' or 'controversies' within the meaning of Article III of the Constitution, and so has no jurisdiction to review 'administrative or legislative issues or controversies'." **Boggess v. Berry Corporation**, 9 Cir., 1956, 233 F.2d 389, 392. See also **Application of L.B. & W. 4217**, 9 Cir., 1956, 238 F.2d 163.

[4] **Waialua Agricultural Co. v. Christian**, 1938, 305 U.S. 91, 108-109; **De Castro v. Board of Commissioners**, 1944, 322 U.S. 451, 456.
"Our power to reverse rulings of the territorial court on law or fact is limited to cases of manifest error." **Pioneer Mill Co. v. Victoria Ward**, 9 Cir., 1946, 158 F.2d 122, 125, cert. den., 330 U.S. 838.
"We must note that our jurisdiction to review the action of the Hawaiian courts * * * is a narrow one. * * * the question is what standards of fundamental fairness * * * are required by the Fifth Amendment, and whether those standards were here complied with." **Palakiko v. Territory of Hawaii**, 9 Cir., 1951, 188 F.2d 54, 60, cert. den., **sub nom, Palakiko v. Harper**, 347 U.S. 956; **Alford v. Territory of Hawaii**, 9 Cir., 1953, 205 F.2d 616, 617-618.

Whether such acts charged to Judge Wiig were "shocking and horrible" is beside the point. Mrs. Sawyer chose to characterize them as such.

To conclude that Mrs. Sawyer was referring to Smith Act cases generally, and to "all Smith Act cases," but was not referring specifically to this one case then on trial, is to my mind nonsense. *Her* attorney at the trial clearly understood "that this was a talk about what was going on in the Smith Act trial here in Honolulu. Now let's not fool ourselves about that. We're lawyers here." Mrs. Sawyer said: "Unless we stop *the* Smith [Act] trial in *its* tracks *here* there will be *a new crime.*" Mrs. Sawyer was then and there referring to but one Smith Act case; *the* Smith Act case then before Judge Wiig. Any other interpretation flys in the face of reality and renders the English language not understandable.

The point urged by Judge Pope that "Judge Wiig did not rule upon Crouch's testimony until long after the speech," seems to me to compound the offense rather than excuse it. If the court had not yet made its ruling on admissibility, even more reason existed why Mrs. Sawyer should not attempt to influence the court's subsequent order by inflaming her audience outside the courtroom during the trial's progress. This was a criminal trial by jury who were not impounded but were permitted to mingle with the community when the court was not in session. Even customary media of communication are restricted to "fair comment" in reporting the proceedings.

To me, this case no more involves "freedom of speech" in its constitutional sense than do the rules of court which permit a judge to require an attorney (whether he represents Smith Act defendants or the government or any other litigant) to take his seat in a courtroom, and to refrain from further statement. An attorney, acting as such during the trial of a case, must be subject to certain restrictions upon what he may say or do. To that extent he has lost a certain freedom of speech, and a certain freedom of conduct. To that extent such loss of freedom is a necessary adjunct to the intelligent and orderly enforcement of all litigants' constitutional rights, including those clients the disciplined attorney represents. The attorney need not give up his

complete freedom if he prefers not to act as an officer of the court in the trial of a case. When he purports to so act, whether through preference or in response to duty, unless he is to be bound by the reasonable rules of the court governing all cases tried therein, he advocates that anarchy should rule.

I concur in the affirmance.

POPE, Circuit Judge, with whom HAMLEY, C.J. concurs, dissenting.

I have a very different view of what the facts are in this case. The majority accept the conclusion of the Hawaii court that appellant "engaged and participated in a wilful oral attack upon the administration of justice in and by the said United States District Court for the District of Hawaii and by direct statement and implication impugned the integrity of the judge presiding therein and in the said pending case, . . ."[1] I am satisfied that there is nothing in the record to support that statement. I think this is one case in which it is peculiarly important that we scrutinize with care the proof as to just what did happen.

If appellant used the precise words and made the exact statements that those who testified against her say she did, there is a

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[1]The paragraph in full reads as follows: "Upon its finding and conclusion as stated, supra, this court deems that in saying what she did in her speech to a public gathering at Honokaa, Hawaii, on December 14, 1952, as aforesaid, when there was then pending in the United States District Court for the District of Hawaii a case under the Smith Act, to-wit, the case entitled 'United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et als., Defendants,' being criminal number 10,495 in said court, she engaged and participated in a wilful oral attack upon the administration of justice in and by the said United States District Court for the District of Hawaii and by direct statement and implication impugned the integrity of the judge presiding therein and in the said pending case, within the territorial boundaries of the Territory of Hawaii, and thus tended to also create disrespect for the courts of justice and judicial officers generally, contra to the obligations and duties assumed, as incident to the license, by her and by every person to whom a license has or shall have been issued by this court to practice in the courts of the Territory of Hawaii. She has thus committed what this court considers gross misconduct."

serious and substantial question as to whether the judgment below does not violate her rights under the First Amendment. This is no ordinary case. It is the case of one who has a record of defending persons accused of crime, of representing unpopular labor unions, and of even going so far as to appear for Smith Act defendants. I cannot overlook as a judge what I know as an ordinary citizen in common with every one else, that many persons think that one who would handle such cases as has the appellant ought to be disbarred just on general principles. And when the Supreme Court of Hawaii arrives at a conclusion couched in the language just quoted, which finds no counterpart in any word or statement in the record, I consider it my duty to inquire with care whether such statement really represents the facts of the case.

That we are not limited in our examination of the facts is plain since the Supreme Court heard no testimony but heard the case solely upon the written record and "made its own evaluation thereof" "unprejudiced by the report of the legal ethics committee." Our duty, as a federal court, to find the facts for ourselves in the process of determining whether appellant's claim of a federal right under the Constitution, has been frustrated by erroneous conclusions of the Territorial Court, is recognized by the Supreme Court of the United States. That Court, when reviewing a state court decision under circumstances similar to those here, insists on finding the facts on which the constitutional right turns, for itself. As stated in Stein v. People of State of New York, 346 U.S. 156, 181: "Of course, this Court cannot allow itself to be completely bound by the state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding."[2]

Our power to review decisions of the Supreme Court of Hawaii is substantially the same as that exercised by the Supreme Court of the United States in reviewing final decisions of the highest

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[2] "But the prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have." Brown v. Allen, 344 U.S. 443, 500.

courts of the states.[3] At least ever since Kansas City So. Ry. Co. v. Albers Comm. Co., 223 U.S. 573, that Court has stated the rule as follows: "In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. (cases cited) Another class of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the question to analyze the facts." Truax v. Corrigan, 257 U.S. 312, 324-325. This rule has been announced on numerous subsequent occasions.[4] It is an everyday practice in the review, by the Supreme Court, of state court decisions. Thus in Schware v. Board of Bar Examiners, 353 U.S. 232, where Schware claimed he had been denied a constitutional right, the Court examined the facts for itself, and at great length, and posed the matter for its decision as follows, (p. 239): "Therefore the question is whether the Supreme Court of New Mexico on the record before us could reasonably find that he had not shown good moral character." It concluded, (p. 246): "There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law." Hence, it was held, the state had deprived him of due process of law.[5] Other cases in which the Supreme Court, in considering claims of infringement of constitutional rights, found the facts for itself are Fikes v. Alabama, 352 U.S. 191; Leyra v.

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[3]Cf. Prensa Insular de Puerto Rico v. People of Puerto Rico, 1 cir., 189 F. 2d 1019, 1021, which examines the history of the same jurisdictional Act.

[4]Such, for example, as Drivers Union v. Meadowmoor Co., 312 U.S. 287, 293; and Fiske v. Kansas, 274 U.S. 380, 385.

[5]The concurring opinion, rejecting the state court's finding that petitioner was "a person of questionable character", called it "so dogmatic an inference as to be wholly unwarranted." (p. 251)

Denno, 347 U.S. 556; Konigsberg v. State Bar, 353 U.S. 252; and Moore v. Michigan, 355 U.S. 155.[6]

When the facts of this case are thus examined, it should be readily apparent that they do not justify or warrant the conclusion of the Hawaii court above quoted. To assert, as did that court, that the remarks made by appellant, either as charged in the complaint against her, or as shown by the evidence when taken most strongly against her, was a "wilful oral attack upon the administration of justice in . . . the said United States District Court", and that she "by direct statement and implication impugned the integrity of the judge presiding therein", is, it seems to me, to use the language of Mr. Justice Frankfurter in the Schware case, supra, so dogmatic an inference as to be wholly unwarranted, and so arbitrary as to be offensive to due process. Wieman v. Updegraff, 344 U.S. 183, 192; Slochower v. Board of Education, 350 U.S. 551, 559.

I shall discuss, infra, the question whether, even if appellant had made an attack upon Judge Wiig, she exceeded the bounds of an attorney's certain right to criticize a court or judge. But that question is a hypothetical one, for, as I shall show, appellant did not attack the court or the judge. I shall first proceed to show what the record states she did say; and when the facts of the case are viewed as they really are, it becomes manifest that the order of suspension is not only arbitrary and a denial of due process, but an unjustifiable infringement upon appellant's right of free speech under the First Amendment.

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[6]Cf. also, Lambert v. California, 355 U.S. 225, where it was held conviction under an ordinance was a violation of due process in view of the fact, which the Supreme Court found, that petitioner had no knowledge of the requirements of the ordinance. Another recent case which shows the same approach where there was a claimed denial of the right of free speech, is Staub v. City of Baxley, 355 U.S. 313, 318. The question was the sufficiency of the pleadings to present the point in the state court. It was asserted this was a question of local procedural law. The court held: "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; . . . and the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

The most complete and most nearly contemporaneous account of just what appellant did say at the Honokaa meeting is found in the notes made by a newspaper reporter who attended the meeting and the following day wrote a newspaper account of it. A week later he was asked by his editor to transcribe his original handwritten notes and he did so filling them out and making them understandable to the reader.[7] While appellant denies making some of the statements found in the notes, for the purposes of this opinion I take the version shown by the notes. The majority opinion, for the purpose of indicating what happened at the meeting, quotes the newspaper account on the ground that the Hawaii court accepted that as accurate. The reporter, at the hearing, some two years after the speech was made, did not testify that the newspaper story was an accurate statement of what transpired. He merely stated that he wrote the story "based upon the notes . . . made during the speech." My objection to its use is not because it is mere hearsay, but it could furnish an excuse for not examining the facts. No one can claim to know what this case is about unless he has read, with care, the full notes of the speech made by the newspaper reporter. They appear as Exhibit B attached to Judge Chambers' opinion.

The newspaper account gives no support to the Hawaii court's conclusions. But in arriving at the facts here it should be noted that the story is distorted, for the reporter has selected, as no doubt most reporters would do, only the most startling portions of the speech,—the parts containing the best headline material.

But when all the notes are read, an unmistakable picture of just what kind of speech was made, and what it was about, clearly emerges. What we have here is an attack on the methods used in all Smith Act prosecutions, including the one then pending, and hence, implicitly an attack on the Smith Act itself. The notes show exactly what appellant talked about. It was as follows: (a) Men in power are trying to put men in jail for what they think and what they read; (b) the prosecutions are for conspiracy—when the Government charges conspiracy, it has

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[7]The original handwritten notes, taken at the meeting, had been given to the FBI by the reporter. They were not produced and the record shows no serious effort by the Bar Committee to obtain them.

no case—"conspiracy means to charge a lot of people for agreeing to do something you have never done"; (c) The FBI's special agents, widely publicized as wonderful, spend their time investigating people's minds, while hundreds of tax frauds go unprosecuted; (d) Among the agents so used were Paul Crouch and Johnson;[8] Crouch testified what he was told by generals when he was "galloping over the plains of Russia" at a time when one of the defendants was four years old, while Johnson testified he carried some Communist books from San Francisco to Honolulu, in a duffle bag, and showed the bag to Jack Hall; (e) On the strength of this the Government "for two days reads from books supposed to have been in the duffle bag . . . so jack hall violated the smith act because he saw a duffle bag with some books on overthrowing the government in it. its silly;" (f) Crouch testified to things he couldn't possibly remember. Yet they use this kind of testimony. (g) "Some of the witnesses testified differently from what they testified previously." (h) "witnesses testify what government tells them to"; (i) "they will do anything and everything necessary to convict"; (j) "the government has carried on a barage of propaganda" and "expects people in the jury to have hysteria just hearing about communism is enough to jail"; (k) an account of a Sears Roebuck employee who knew Hall. When he refused to testify against Hall the FBI asked his employer to fire him,—when he was not fired they went to the Los Angeles and Chicago offices of the employer and convinced them he had to be fired; (l) "the government gets away with it by making people fear that if they don't do as it wants they'll be branded red and lose their jobs, there's no such thing as a fair trial in a smith act case. All rules of evidence have to be scrapped or the government can't make a case"; (m) in the Palakiko-Majors case[9] the court would not let a woman testify she heard a police officer say he beat the prisoner, because the officer was absent and had no chance to deny it, yet the judge permitted Crouch "to testify about 27 years ago. what was said then", at a time "when the defendant was 5 years old." (n)

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[8]The Fujimoto record indicates this was not Manning Johnson but a Henry Johnson.

[9]See Palakiko v. Harper, 9 cir., 209 F. 2d 75.

"there's no fair trial in the case. they just make up the rules as they go along"; (o) A reference to the New York Smith Act case: "the government can't make a case if it tells just what they did so they widened the rules and tell . . . . everything including the kitchen sink"; (p) "unless we stop the smith trial in its tracks here there will be a new crime. people will be charged with knowing what is included in books. ideas." (q) "mentioned los angeles trial in which someone said there was no evidence that someone had instructed persons not to read some books"; (r) "there'll come a time when the only thing to do is to keep your children from learning how to read. then not only will unions be destroyed but so will freedom of thoughts and action, there'll be dark ages of thought control when people won't be able to speak freely in taverns and other places"; (s) "urged audience to . . . explain what a vicious thing the smith act is. people are tried for books written years ago."

The most interesting thing about this near-contemporaneous record of the speech is that it is devoid of any attack upon Judge Wiig or his court. The only reference to the judge was the criticism of his ruling (item "m" above) on the admission of the Crouch testimony. But this was no attack on his integrity. Aside from this the judge was not even referred to. His name was not mentioned. These notes of the reporter are of special importance here, not merely because they were made when his memory was fresh, but also because, as I shall shortly show, they were confirmed by the other witnesses who testified. In short, the notes are a fair summary of all the evidence.

This record does not warrant a conclusion that the integrity of Judge Wiig was attacked. Everything in it is consistent with appellant's position that the speech was directed at Smith Act prosecutions and the Smith Act, and not at Judge Wiig personally. Some of the remarks quoted in the notes she denied making, but I assume for the purposes of this opinion she made all of them, just as the notes show.

Take the statement about "some rather shocking and horrible things that go on at the trial." Have a look at the notes. This remark is made at the beginning, obviously by way of introduction of what she proposed to tell as she went along. The meaning is

plain. I am about to tell you some rather shocking and horrible things that go on. What these "horrible and shocking things" were she specified in detail, extending the itemization to Smith Act trials generally. These were: the use of conspiracy counts; the use of such witnesses as Crouch and Johnson; the use of such "silly" testimony as that given by them; the Government's knowing use of witnesses whose testimony was contrary to that previously given; the Government's propaganda intended to give juries hysteria. Nowhere is there any "shocking and horrible" thing charged to the judge—the specific acts recounted are charged to the Government; to its means of prosecution, and to the Smith Act itself. No witness testified that in this connection, or at any place in the speech, was there any mention made of Judge Wiig.

The Hawaii court wholly failed to consider the context in which the "shocking and horrible" words were used. Its opinion lumps these words with other supposed quotations from the speech, wholly without any attempt to analyze the phrase as the opening of a 30 minute speech. As quoted by the court, appellant said "that a fair trial was impossible." On such truncated quotation it is sought to show that this was a remark limited to the Fujimoto case alone, rather than addressed to Smith Act trials generally, as appellant testified. The notes, read in their entirety, as well as the other testimony, fully disclose that she was discussing all Smith Act cases.

The notes show she said: "There's no such thing as a fair trial in a Smith Act case." After contrasting the exclusion of hearsay in the Palakiko case with the use of Crouch's testimony about what happened 27 years ago, she continued "There's no fair trial in the case. They just make up the rules as they go along." That by this she was still referring to all Smith Act cases is apparent, for she proceeded immediately to illustrate this by describing how this was done in the New York Smith Act case in 1949, with her reference to "everything including the kitchen sink." These were not different speeches—all occurred in the same 30 minutes. No part may fairly be read out of context.

John D. Morse, a witness called by the prosecutors, who was Industrial Relations Director of Honokaa Sugar Company, testi-

fied as follows: "Q. Mr. Morse, do you remember Mrs. Bouslog making any statement as to whether there was such a thing or not as a fair trial in the Smith Act case? A. I remember her saying there was not such a thing as a fair trial in a Smith Act case. Q. And do you remember whether she referred to the conduct and manner in which it was being handled? A. Well, it tied in, I figured it, tied in with any Smith Act case, whether in Honolulu, New York, or whatever it was; that is the impression I got from what she said."

The next mistake in the Hawaii court's statement is its recital that she said "that all of the rules of evidence *were being scrapped* so the government could make *its case.*" (Emphasis mine) So worded it seems to refer exclusively to what was *presently* going on in Honolulu. But the notes have her saying, immediately following a reference to any Smith Act case: "All rules of evidence *have to be scrapped* or the government can't make *a case.*" (Emphasis mine)

This remark, too, when read in context, clearly was not directed against the judge. As the notes show, it was immediately followed by her illustration of the distinction between other trials and conspiracy trials by reference to the Palakiko habeas corpus case where hearsay was excluded contrasted with the present conspiracy trial where "they permit a witness to tell what was said when a defendant was five years old." This is the same idea she expressed in her reference to the New York trial. A large part of the talk was devoted to her claim of the excessive breadth of conspiracy trial evidence. As appellant explained to Judge Wiig, this remark about rules of evidence having to be scrapped, referred to the use of declarations of third persons in conspiracy cases. There is no proof whatever that it was used otherwise. And the prosecution witness Ferreira testified: "Q. Just tell the Committee to the best of your recollection what Mrs. Bouslog said. A. She started off telling us about the Smith Act trial; that there was no fair trial in the Smith Act case; that the government—I mean, they made up their rules as they went along in Smith Act trial, and she compared the Majors-Palakiko case with the Smith Act trial, and she also stated that in the Smith Act trial they tried you on a conspiracy, and 'conspiracy' was explained to us, not the exact wording, but was something that

they tried you for, for your thoughts; in other words, something that some people think, or you might think of, or this person might think of doing some day, but never actually did, but that is how she explained it on this conspiracy."

The final statement listed in the Hawaii court's opinion is that referring to "stopping the Smith trial in its tracks." Taking it as it appears in the notes, and disregarding a slight inaccuracy in the court's version, she said: "Unless we stop the Smith trial in its tracks here there will be a new crime. People will be charged with knowing what is included in books. Ideas." Just what this statement, so recorded by the reporter, meant, is not explained by any proof offered by the prosecutor. The one thing clear about it is that it could have no reference to Judge Wiig. On the face of these exact words I would think stopping the Smith trial in its tracks would mean getting a verdict of acquittal. Or it might mean what actually happened to the case. See Fujimoto v. United States, 251 Fed. 2d 342 (Jan. 16, 1958). Appellant herself gave an explanation. Denying these were the exact words, she said: "I did state in substance something that is reminiscent of that. I said that the Smith Act—continued prosecutions under the Smith Act can lead to a new crime of reading and thought control, and I quoted, as I told Judge Wiig—I quoted the exact language of the prosecutor in the Smith Act trial in Los Angeles, where he had said that all the defendants did was ask people to read, read, read, and they never told people not to read anything. And I said that I felt that the Smith Act would be repealed as soon as people understood what the Smith Act was."

No other witness testified as to this statement. But the reporter's notes tend to confirm her explanation for they show the remark was followed by the reference to reading made in the Los Angeles trial. The confirmatory value of those notes is particularly striking since just two days after the speech, and nearly a week before the notes were typed, and when appellant could not have known what was in them, she gave precisely the same explanation to Judge Wiig. Whether her explanation that she was advocating repeal of the Smith Act be accepted or not, there is no proof whatever that it had any more serious import.

As a final step in analyzing the evidence I allude to a statement which is not listed in the complaint or the opinion, but which appellee seems to think tends to show appellant was directing her talk against Judge Wiig. This is the statement "They just make up the rules as they go along." The use of the pronoun "they" is clear enough. It is in the reporter's notes. All the witnesses who referred to this statement said "they", or "the Government" in connection with the phrase. That this "they" referred to the Government is clear from the whole context. Previous to this phrase, the notes show appellant was throughout talking of the Government. The *Government* "when it hasn't got enough evidence it lumps a number together"; "the *government* does not say advocated overthrow but says they agreed to"; "the *government* goes on with testimony for two weeks on what crouch did"; "the *prosecution* says crouch did this and that"; *Government* propaganda has been going on "the *government* says there was an agreement to violate smith act"; as to witnesses telling conflicting stories, "the *government* knows this but deliberately goes ahead"; "witnesses testify what *government* tells them to"; "then the *government* for two days reads from books"; "the *government* has carried on a barrage of propaganda"; "the *government* gets away with it by making people fear". When all this is followed by "They just make up the rules as they go along", it is absurd to say that appellant was now including the judge in the "they". Appellee argues that as a matter of course it is the judge who makes the rules. The trouble with this is that the evidence does not show she made any such statement. And its improbability appears from the fact that when the speech was made Judge Wiig was still reserving ruling on much of the evidence. All significant rulings were made by Judge Wiig late in the case and long after the speech.[9a]

A proceeding of this kind cannot be founded upon such dubious evidence;—a judgment of disbarment or suspension[10]

[9a]This I develop later. See text opposite footnote 19 infra.

[10]Appellant claims that in her case suspension means the same as disbarment, since Rule 15 (d) of the Territorial Supreme Court, adopted October 3, 1955, requires a lawyer once suspended to start all over, proving his worthy character, and passing a new bar examination. Apart from that I see no difference, for the purposes of this case, between a disbarment and a suspension.

cannot be supported by that kind of proof. The power to order disbarment "is one that ought always to be exercised with great caution; and ought never to be exercised except in clear cases of misconduct, which affect the standing and character of the party as an attorney." Ex Parte Wall, 107 U.S. 265, 288. See accord, In Re Spicer, 6 Cir., 126 F. 2d 288, 289. "It is settled that charges of unprofessional conduct on the part of an attorney should be sustained by convincing proof and to a reasonable certainty and that any reasonable doubts should be resolved in favor of the accused." Brawner v. State Bar of California, 48 Cal. 2d 814, 313 P. 2d 1, 3. This requirement of clear proof is insisted upon by the courts generally.[11]

In my view there can be no other conclusion here than that the appellant's speech was an attack upon the Government's method of procedure in Smith Act cases including the one then on trial at Honolulu; and an attack upon the Smith Act generally.[12]

Upon these facts it is impossible to avoid the conclusion that what appellant had to say did not overstep the limits of that freedom of speech guaranteed by the First Amendment. As I shall hereafter demonstrate, her right to discuss and criticize the mode of prosecution of Smith Act cases extended not only to cases previously tried, but to the pending case as well. That the Honolulu case was still pending made no difference whatever, as Bridges v. California, 314 U.S. 252, and the cases which followed it, discussed hereafter, abundantly show.

Why appellant chose to make such a speech to that audience and at such a time and place is difficult to comprehend. It seems

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[11]The cases are collected in 7 C.J.S. "Attorney and Client", §33, pp. 784-785.

[12]So far as her attack on the Smith Act is concerned, it is of interest that she could not have foreseen that if she would but hold her fire, she might have saved herself some trouble. Her timing was poor. The decision in the Yates case, 354 U.S. 298, if we take the words of Judge Chambers for it, left that Act "a virtual shambles". Fujimoto v. United States, 9 Cir., 251 F 2d 342 (Jan. 16, 1958). At any rate, her clients went free. (Of course the majority of the court who sat with Judge Chambers did not concur in his statement that the Act was a shambles. Nor would I. All Yates did was to show that the Act punished only incitement to action, and not mere advocacy of doctrine.)

probable that few, if any, of her audience had any understanding of what she was saying, and it cannot be believed that she thought any one present could do anything about repealing the Smith Act. I assume that the Union, under whose auspices the meeting was held, was being urged to help in the defense. Its Regional Director, Hall, was one of the defendants. A report to the union on the progress of the trial, which had just begun, would of course be in order; and a simple appeal for funds should serve to secure financial aid, if that were her purpose. But this particular speech, which, in view of the temper of the times was bound to cause her trouble, must have been undertaken, I think, primarily as a means of expressing a bitter resentment at what she thought were monstrous injustices.

But whether I can find reason for that speech, and my own disagreement with it are wholly irrelevant. In the words of Judge Pound: "Although the defendant may be the worst of men . . . the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected."[13] That speech is unreasonable, exaggerated, and offensive, does not deny it freedom. Speaking for the Court in Cantwell v. Connecticut, 310 U.S. 296, 310, where the words of the defendant were especially outrageous, Mr. Justice Roberts said: "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[14]

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[13]People v. Gitlow, 234 N.Y. 132, 158.

[14]In Near v. Minnesota, 283 U.S. 697, Chief Justice Hughes made the same point by quoting from Madison. (p. 718) "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits. And can the

Freedom of speech is not absolute. It may be limited where the facts show a "clear and present danger."[15] But most assuredly freedom of speech does not mean freedom of speech that is true, or sound, or reasonable. It means freedom of speech, period. Freedom means nothing unless it includes freedom for those we hate.[16] Freedom of speech is only a delusion unless it means freedom for others to express what we detest. Though a speech "stirred people to anger, invited public dispute, or brought about a condition of unrest," punishment for making it violates the First Amendment. Terminello v. Chicago, 337 U.S. 1, 5. "For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." Bridges v. California, supra, p. 263. In its broad scope it draws no line, it does not exclude lawyers, or even lawyers who represent the ILWU or persons claimed to be Communists.

In thus making an attack upon the Department of Justice,—"the Government"—for the manner in which it was prosecuting

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wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had 'Sedition Acts' forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?'"

[15]Schenck v. United States, 249 U.S. 47, 52.

[16]Cf. Girouard v. United States, 328 U.S. 61, 68, quoting Mr. Justice Holmes in the Schwimmer case, (279 U.S. pp. 654-55): "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."

Smith Act cases, appellant listed many items of grievance. She criticized the use of the conspiracy technique;[17] she criticized the use of "agents of FBI" generally, and of Crouch and Johnson in particular; she criticized the use of the Government's "barrage of propaganda", and charged the FBI with pressuring Sears Roebuck to "fire" a man because he would not testify against one of the defendants. She charged that the prosecution would "do anything and everything necessary to convict"; that "witnesses testify what the Government tells them to". She urged her audience to tell "what a vicious thing" the Smith Act is. "People are tried for books written years ago."

As I read the newspaper reporter's notes of the speech it seems to me that the prime subject of her speech was Crouch, and other Government witnesses. She alluded to her Honolulu Labor Day speech in which she had discussed professional witnesses, former Communists now paid by the Government. She did not otherwise identify Crouch,[18] The fact that appellant's principal complaints related to the use of Crouch and to his testimony, and similar testimony of other witnesses, sharpens up the point that there was no attack on Judge Wiig. The record in the Fujimoto case is here and is available to us. Latta v. Western Inv. Co., 9 cir., 173 F. 2d 99, 103; United States v. Pink, 315 U.S. 203, 216. Judge Wiig did not rule upon Crouch's testimony until long after the speech, indeed, nearly three months later. Then, on March 10, the court ruled on motions to strike this and other testimony which had been received subject to motion to strike. (Some of Crouch's testimony was then stricken along with that of some others.)[19]

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[17]A classic discussion of that subject is that of Mr. Justice Jackson in Krulewitch v. United States, 336 U.S. 440, 445.

[18]He was the Paul Crouch, who with Manning Johnson and Matusow, were described in Communist Party v. Control Board, 351 U.S. 115, as "three perjurious witnesses."

[19]The record there shows that the Government's case was built largely around Crouch and his testimony. He was the lead-off witness. He was on the stand from November 12 through November 24, and his testimony covers 962 pages. As the Government briefs in that case show, the case was based upon the theory of Marxism-Leninism. The briefs emphasize the importance attached to proof of that theory by the prosecution. Crouch was the witness on whom they depended for this proof. He testi-

One cannot fairly find in this speech any attack upon the integrity of the judge. Proof of any such thing is completely wanting. There is not a scintilla of evidence to that effect—far less the "clear and convincing evidence" which such a case requires.

When it is recognized that there was no attack on the integrity of the judge, the whole case collapses. Stripped down to its actual facts the judgment of the Hawaii court means no more and no less than that for such an attack on the Department of Justice, an attorney may be disciplined by suspension from practice. True, the court below never got down to stating the proposition in those simple terms. Its faulty findings were masked with generalities like "attack upon the administration of justice", and "disrespect for the courts." Surely no one argues that a lawyer may be disbarred for an attack upon the Department of Justice.

The freedom of speech of the First Amendment is a peculiarly American concept. Historians have shown,[20] and the Supreme Court has held that this amendment was not, like some other provisions of the Bill of Rights, a mere adoption of rules deeply rooted in English common law at the time of the Constitution. "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed." Bridges v. California, supra, p. 265.[21]

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fied as an expert on the Communist Revolution and the theory of the Communist Conspiracy, the Comintern, the Red Army, and Red Army materials. According to the witness he himself was on an executive committee of the Communist International to draw up a plan for infiltration of the armies of the capitalist countries. The witness testified he arrived in the Soviet Union in 1927. He was asked: "Q. And while you were in Russia, what did you do and did you meet any person?" When this was objected to, upon Government counsel's statement that he would later "tie the testimony in" the witness was allowed to proceed subject to motions to strike.

[20]Zecharish Chaffee, Jr., "Free Speech in the United States", Chap. 1.

[21]The Court quoted (p. 264) Madison's statement that "The state of the press . . . under the common law, cannot . . . be the standard of its freedom in the United States."

And this amendment is not only first in number but first in importance of those ten amendments. Cut off freedom of speech, or of the press, and you stop the very lifeblood of a democracy which may live and function only if knowledge and opportunity for discussion are available to all. As Madison said: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[22] In United States v. CIO, 335 U.S. 106, 129, 144, Mr. Justice Rutledge, speaking for himself and three other justices concurring, said: "The most complete exercise of those [First Amendment] rights is essential to the full, fair and untrammeled operation of the electoral process. To the extent they are curtailed the electorate is deprived of information, knowledge and opinion vital to its function."

Another reason why attacks on the freedom of an individual to speak must be struck down is the way in which the consequence of a single failure to respect that right may spread, like a mantle of fear, over the whole nation. Suspending one person like Harriet Bouslog Sawyer from the practice for one year is not merely the imposition of punishment on her. In upholding this judgment this court serves notice on all lawyers everywhere to hold their tongues, to watch their speech, lest some court hold criticism of a state or federal prosecutor's procedures be ground for disbarment. The very thought that such a proceeding as this might be started would be enough to dry up criticism of government prosecutions no matter what abuses may exist. That is why this freedom is of the very essence of liberty. Let the courts tolerate one single instance of punishment for exercising freedom of speech, and all who heard of it, if they be men of caution, will instantly cease to be free. "When you put the hotheads in jail, these cooler people do not get arrested—they just keep quiet. And so we lose things they could tell us, which would be very advantageous for the future course of the nation. Once the prosecutions begin, then the hush-hush begins too. Discussion becomes one-sided and artificial.

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[22]Letter to W. T. Barry, August 4, 1822.

Questions that need to be threshed out do not get threshed out." Chaffee, supra, loc. cit. 561.

Infringement of freedom of speech destroys thought itself. Instead of inquiring:—"Are these the facts?" "Do I believe this?" we would be asking: "If I think this way, and say so, will I be considered 'controversial', or 'disloyal', or 'subversive'? Will it cause me trouble?" In his recent Reith Lectures at Oxford University George Kenhan noted the Russians' "systematic abuse of the human intellect"; "the fact is that the Soviet leaders are the first and leading victims of the abuses they have practiced so long on the freedom of the mind."

The contention here is that appellant cannot claim to be in the position of an ordinary critic of the Department of Justice, for in attacking what went on in Judge Wiig's court she necessarily included the judge for he must have permitted it. Evidence criticized, it is said, was necessarily that which the judge admitted. Furthermore, goes the argument, appellant was violently attacking proceedings in a case in which she was counsel. She was trying her case in a public meeting, with a view to influencing the outcome, and this, it is said, is a violation of a lawyer's professional obligation. This position, I think, will not bear analysis.

In the first place, if we examine what appellant was really saying, it is clear that there was no charging of Judge Wiig with these things. To say she must have been blaming Judge Wiig for Crouch being a witness, or for his testimony is not correct. Of course no one could think the judge selects the witnesses, or thinks up what they shall be asked. The use of the conspiracy form of indictment was, as anyone would know, something chargeable only to the prosecution. I have previously noted, supra, (text opposite note 19), that the important rulings on the admission of testimony came long after the date of this speech;—they certainly were not included in the condemnations of the talk.

But even if rulings admitting evidence, and other rulings on points of law had been the subject of appellant's attack, nothing is more plain, I think than that courts are properly subject to such criticism, and freedom of speech in that direction is within

the First Amendment protection. While Mr. Justice Frankfurter, in his opinion in Bridges v. California, 314 U.S. 252, 284, was dissenting, yet it is clear the whole Court would approve his statement: "Of course freedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power. Particularly should this freedom be employed in comment upon the work of courts, who are without many influences ordinarily making for humor and humility, twin antidotes to the corrosion of power." And he quoted in a footnote from a speech by Mr. Justice Brewer, (p. 289): "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgment subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death."

Suppose appellant had said: "They produce these witnesses like Crouch, and he testifies to what somebody said when Aileen Fujimoto was only four years old," and then added: "and Judge Wiig lets them do it." We must remember that the test of judicial or legislative power to restrict freedom of speech is the "clear and present danger" standard. The notion that even a direct reference to Judge Wiig, such as that in the supposititious statement I have just assumed, could be a clear and present danger to the fair administration of justice in Judge Wiig's court is manifestly absurd. Such restrictions on appellant's right to speak as were imposed by this judgment are subject to the condemnatory language of the court in Bridges v. California, supra, (p. 270): "If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert. The substantive evil here sought to be averted has been variously described below. It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of

American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect. . . . We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment." Then, after discussing the language used in the statements there involved, the Court concluded, (p. 278): "The words of Mr. Justice Holmes, spoken in reference to very different facts, seem entirely applicable here: 'I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words.' "

The same test was applied in Pennekamp v. Florida, 328 U.S. 331, 348, and Craig v. Harney, 331 U.S. 367, 376. In the latter case, the Court, speaking of the Constitutional limits on the power of a court to punish for contempt, said: "This was strong language, intemperate language, and, we assume, an unfair criticism. But a judge may not hold in contempt one who ventures to publish anything that tends to make him unpopular or to belittle him. . . .' . . . The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil. . . . But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate. Conceivably a campaign could be so managed and so aimed at the sensibilities of a particular judge and the matter pending before him as to cross the forbidden line. But the episodes we have here do not fall in that category. Nor can we assume that the trial judge was not a man of fortitude."

The significance of these three cases, (Bridges, Pennekamp, Harney) is that although they dealt with contempt proceedings, the basis of the decision in each case was the constitutional limitation. The same absence of a clear and present danger which voided these contempt orders would make the Hawaii court's judgment in this case a prohibited restriction on free speech even if the speech had expressly included the judge in the supposititious manner indicated. I take it no one will contend that conduct which could not validly be punished as contempt may nevertheless be disciplined by suspension from practice.

The three cases last mentioned also completely dispose of the suggestion that attack may not be made on proceedings in court in a *pending* case. The Supreme Court dealt with that question at length. Of course, the possibility of clear and present danger to the functioning of a court of justice from certain speech or publication could occur if they were directed to pending proceedings.[23] But the facts of this case present no such situation. That a speech in a town of 1000 population,[24] in the island most distant from Honolulu posed a clear and present danger to the administration of justice in Judge Wiig's court, is inconceivable. There is neither finding nor argument to that effect made here.

As for the circumstance that appellant was counsel in that pending case, this is wholly irrelevant. *If* it were not for Cammer v. United States, 350 U.S. 399, and *if* appellant were being proceeded against in the United States District Court for Hawaii for contempt of that court, (she was not, and Cammer says she could not be), then her connection with that case might have meaning. But that it has no significance here even the Hawaii court seems to have recognized, for this circumstance is not even mentioned in its conclusion.[25]

Finally, what of the suggestion that while a newspaper or a layman may criticize prosecuting officers, and attack courts and

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[23]The language above quoted from Craig v. Harney, supra, is that "conceivably" in a matter pending, a campaign could "cross the forbidden line."

[24]Hammond's World Atlas, 1955 ed., gives Honokaa's population as 1021.

[25]This is the conclusion quoted in footnote 1, supra.

judicial officers, yet the constitutional free speech protections do not extend to such actions by a lawyer? I do not here refer to utterances of a lawyer which (a) threaten the judge's person or reputation,[26] or (b) charge that the court or judge has knowingly misused its powers in a particular case,[27] or (c), assert that the judge is corrupt or politically motivated.[28] There is no such case here, as I have shown. Actually Judge Wiig was not even criticized, much less attacked.

But in respect to such criticism, as was here made, no suggestion has ever been made that a lawyer's criticism is any less protected than when made by a layman or a newspaper. Indeed, everything that has been said authoritatively about the First Amendment is to the effect that the rights there granted are universal and all-covering. "For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language read in the context of a liberty-loving society, will allow." Bridges v. California, supra, p. 263.

I think it would be a sad day when a court held that a lawyer has any less right to criticize the Smith Act, or the use of conspiracy indictments, or of professional witnesses, or the results and decisions in the Yates and Dennis cases, than any other person. For the lawyer is, above all other persons, the one best equipped by training to discuss such controversial questions. To say they may be discussed by laymen, but not by lawyers is untenable.

Rather than saying that the right of a lawyer to criticize or attack current judicial procedures is less than that of a layman, there is reason for belief that the lawyer's speaking out on such matters serves a public purpose. Court proceedings, especially criminal proceedings, have an impact on fundamental rights. It is essential that the people be informed on such rights. Lawyers are equipped to discuss them. They know, what Judge Learned Hand has said: "Liberty lies in the hearts of men and women;

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[26]Bradley v. Fisher, 13 Wall. 335.

[27]Duke v. Committee on Grievances, (C.A.D.C.) 82 F. 2d 890.

[28]Cobb v. United States, 9 cir., 172 F. 641.

when it dies there, no constitution, no law, no court can save it."[29] Professor Thomas Reed Powell has been quoted as saying, "Nine men in Washington cannot hold a nation to ideals which it is determined to betray."[30] I see no way in which it can be held that a President of a Bar Association may discuss these things but persons holding appellant's views may not.

This case bears a striking resemblance to the threatened disbarment in 1938 of one Edward Lamb, a Cleveland lawyer, said to have been a "labor lawyer". While the case never came to trial and was not reported, the part taken in it by the then Solicitor General Robert H. Jackson can be found reflected in a later decision of the Supreme Court to which I shall hereafter allude—a decision of importance here. Lamb, during the trial of a case, and in the courtroom, said directly to the judge: "We were hijacked through this court all day yesterday, and I will tell you now I don't intend to be hijacked all day today." The judge might have punished him for contempt, but did not do so. However, proceedings were brought to disbar him. The Solicitor General came to Lamb's aid, as he concluded from the record Lamb did not deserve disbarment. Jackson was criticized for going on Lamb's committee. He wrote a letter in reply to that criticism. When the letter was made public the disbarment was dropped. The letter precisely fits the situation here. Mr. Jackson noted that the court had an adequate remedy for any contempt. "For some reason this remedy was abandoned." Then followed the declaration of a rule which the author, as an Associate Justice, later wrote into an opinion: "Mere contempt of court has never been considered cause for disbarment." Mr. Jackson proceeded: "Hot words, even to a judge, do not usually deprive one of his livelihood. If you are familiar with the history of the Bar, many instances of contempt without disbarment will occur to you. Elihu Root and Willard Bartlett were, with other bar leaders,

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[29]Hand, "The Spirit of Liberty."

"In this connection we must remember that the strength of the Constitution is not in the written instrument, nor in the laws enacted to carry it into effect, nor even in the judiciary which interprets and enforces the laws, but in the minds and hearts of the people." Judge John J. Parker, American Bar Association Journal, Jan. 1958.

[30]See Chaffee, Free Speech in the United States, Chap. X.

adjudged to be in contempt of court when they were defending William M. Tweed. No one suggested that either of them should be disbarred. Instead, one became a great leader of the American Bar, and the other became Chief Judge of the New York Court of Appeals.[31]. . . In Lamb's case, however, the Court allowed the time for appropriate remedies for Lamb's contempt to pass, and the Bar Association then proposed disbarment, which would drive Lamb from his profession for life and deprive him of a livelihood. I know of no adequate explanation of this fierce and vindicative proposal except that Lamb is a labor lawyer."

* * *

"You suggest that the defense of Lamb proceeds from a desire to break down the judicial system. This, it seems to me, shows a lack of understanding of the requirements of a judicial system. We can have no worthy judicial system unless we protect the right of advocates to champion the cause of any person who becomes involved in the machinery of the law.

* * *

"I do not expect a breach of conduct which would be passed, generally, with a small fine or an apology to be made the excuse for depriving a labor lawyer of his right to practice his profession, or to deprive labor of a representative who has zeal in its cause, even if the zeal is sometimes misdirected." The full text of the letter is in the margin.[32]

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[31]These matters were described somewhat more in detail in Mr. Justice Jackson's opinion for four of the members of the Court in In re Isserman, 345 U.S. 286, 290, 293. The four judges were the majority who set aside the disbarment order at 348 U.S. 1.

[32]"June 7, 1938
Mr. William R. Daley
Cuyahoga Building
Cleveland, Ohio
Dear Sir:

I have your letter criticizing me for authorizing the use of my name in connection with the protest against the disbarment proceedings involving Edward Lamb. I usually ignore criticism, on the theory that friends require no explanation, enemies will accept none, and others do not care. Since your criticism has been so painstaking as to lead you to read the record in the case, I shall depart from my usual rule.

The language of Lamb to the effect that he had been hijacked and did not intend to be hijacked again is not approved or defended by the

In this letter Mr. Jackson suggested that the reason for that proceeding was that Lamb was a labor lawyer. Appellant here

committee of which I am a member, as you would see if you had read its statement. Neither do we assume to sit in judgment on the conduct or rulings of the court.

The court had an adequate remedy for any contempt. If I were presiding and was not conscious of having provoked such language, I should hold a counsellor in contempt and fine him appropriately and commit him until it was paid. This would be proportioned to the offense, would be an adequate humiliation to any lawyer, and would vindicate the dignity of the court. For some reason this remedy was abandoned. Timely and fairly used, it would have been no affair of lawyers generally, even if the penalty might seem to them excessive or the offense excusable.

Mere contempt of court has never been considered cause for disbarment. Hot words, even to a judge, do not usually deprive one of his livelihood. If you are familiar with the history of the Bar, many instances of contempt without disbarment will occur to you. Elihu Root and Willard Bartlett were, with other bar leaders, adjudged to be in contempt of court when they were defending William M. Tweed. No one suggested that either of them should be disbarred. Instead, one became a great leader of the American Bar, and the other became Chief Judge of the New York Court of Appeals. Recently in the District of Columbia a lawyer was found guilty of contempt and punished, and immediately thereafter was elected to high office in the American Bar Association. Not long ago a leader of the New York Bar was adjudged in a Federal Court to have been 'studiously contemptuous' even characterizing parts of the court's charge as a 'stump speech.' He paid his fine and no one suggested that disbarment be inflicted or even considered. A government lawyer was fined for contempt in the same case—nor was he deprived of office or of standing at the Bar. Many other instances could be cited.

In Lamb's case, however, the Court allowed the time for appropriate remedies for Lamb's contempt to pass, and the Bar Association then proposed disbarment, which would drive Lamb from his profession for life and deprive him of a livelihood. I know of no adequate explanation of this fierce and vindicative proposal except that Lamb is a labor lawyer. That offensive and habitual activity on behalf of labor is the cause of his prosecution is affirmed by examination of the petition for disbarment with its allusion to 'class hatreds,' and is further confirmed by the reference in your letter to 'corporation baiters.'

This raises an issue wider than the relative proprieties of the lawyer and the judge. I take it that you will grant that in the economic struggle labor is entitled to have its lawyers. If from habitual representation of labor causes they become known as 'corporation baiters,' I

was a labor lawyer.[33] She was also a lawyer for alleged Communists. In alluding to that I do so only for the purpose of suggesting that this circumstance is the reason I feel we should examine the facts with the greatest of caution lest our detestation of Communism obscure our vision. I make no suggestion here similar to the strictures of Mr. Jackson. I feel sure that this proceeding was instituted in good faith.

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know of no reason why they, any more than their counterparts who become exclusively 'corporation lawyers' should be disbarred. I do not think of any specialty in law practice, but I grant the right, and will defend the right, of a lawyer to devote himself to labor representation as his specialty, if he desires.

You suggest that the defense of Lamb proceeds from a desire to break down the judicial system. This, it seems to me, shows a lack of understanding of the requirements of a judicial system. We can have no worthy judicial system unless we protect the right of advocates to champion the cause of any person who becomes involved in the machinery of the law. I know of no group today that needs competent lawyers to defend it in the courts more than labor. May I remind you that of eleven Labor Relations Board cases on which the Supreme Court has passed, seven of them—more than two-thirds of them—the Supreme Court held to have been unlawfully and improperly decided against labor by the lower court judges. The burden of a labor lawyer in our courts is not easy.

My position on the committee is that I shall defend the right of any member of our profession to appear habitually, if he desires, in labor causes, and the right of a man at the bar to become a 'labor lawyer' as well as to be a 'corporation lawyer.' I expect him to pay such penalty as would be exacted from the lawyers on the other side if they were guilty of similar conduct. I do not expect a breach of conduct which would be passed, generally, with a small fine or an apology to be made the excuse for depriving a labor lawyer of his right to practice his profession, or to deprive labor of a representative who has zeal in its cause, even if the zeal is sometimes misdirected.

I, with the others, will leave no stone unturned to see that this effort does not succeed and to focus public opinion on the effort if it is persisted in.

Sincerely yours,
Robert H. Jackson."

"America's Advocate: Robert H. Jackson", by Eugene C. Gerhart, p. 152.

[33]See Ackerman v. International Longshoremen's & W. Union, 9 cir., 187 F. 2d 860.

But there is one advantage we today have over the prosecutors as they stood in December, 1952. For since that time all of us have learned much about Communism, and that it is a more deadly peril that we had thought. Now we are learning that the way to fight Communism is not by aping its denial of liberty, or its suppression of freedom of speech. When this proceeding was started a generally held notion of our national peril was epitomized in the cry, "Who promoted Major Peress?" When we thought of Communist we thought only of the neighbor next door whose ideas we did not like . . . But today we know that the real threat comes from a different direction and it is an open one: "We'll bury you!" Free men cannot be buried. But if we insist on chipping away our heritage of liberty and freedom then indeed we shall be in danger of losing the decisive battle,—that for the minds and hearts of men. Mr. Justice Jackson put it well when he said: "I have not been one to discount the Communist evil. But my apprehensions about the security of our form of government are about equally aroused by those who refuse to recognize the dangers of Communism and those who will not see danger in anything else."[34]

The Affidavit Concerning the Juror

The second charge in the complaint relates to appellant's alleged misconduct in interviewing the juror in the Fujimoto case after the verdict had been returned. After alluding to the fact that "it has not been uncommon, if not in fact common practice," for attorneys to interrogate jurors after rendition of verdict by them, and adding that any one who "*hereafter* . . . interrogates one who has been . . . a juror of a trial jury", as to any occurrence in the jury room or as to what may have been persuasive in reaching the verdict "acts at his peril", the court then concluded: "However, in the instant matter, this court will let its hereinbefore expressed disciplinary order—suspending the said respondent licensee from the practice of law in the territorial courts for one year and requiring her to pay costs—suffice, although also deeming gross misconduct her said repeated interviews with and interrogations of David Fuller." (Emphasis mine) I think it is plain

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[34]Shaughnessy v. Mezei, 345 U.S. 206, 227, (dissenting opinion).

if it wasn't true. He said that at some time he heard it said that if the defendants weren't convicted it would affect Hawaii's getting statehood. He said that the jurors on the side of the Government said that anybody who was a member of the Communist Party must know what its purposes are and are guilty.

"'He said that the jury wanted Kawano's testimony. He said the jurors on the defense side asked for Kawano's testimony to show that none of the defendants ever talked about overthrowing or destroying the government.

"'He said that one juror said a number of times during the deliberations that he had to go to the Mainland and that they should get it over with.

"'He said that if he voted for the defendants he was afraid the other jurors would tell about it and it would hurt his family. He said one of the jurors played cards in the jury room. He said that there was anger and shouting in the jury room between the persons who were for [450] the prosecution and those who were for the defense. Particularly the jurors for the prosecution got angry with the ones who were holding out.

"'He said they didn't take any secret ballot but anybody on the defendants' side had to speak up and then the others would try to get them to back down. He said that he heard jurors talk about Attorney Gladstein and said he was too smart and that he had defended the Communists in New York and had served a jail sentence. He said that he heard some of the jurors talk about the war against Communism. He said that they didn't consider the character evidence for the defendants.

"'He said the second thing the jury decided was that all defendants were members of the Communist Party.

that the court below simply took no action on this charge. Judge Chambers said: "To us, this is a statement that the penalty for the two charges is imposed concurrently—the same penalty for both charges." The court might have said that, but it did not.[35]

Even the majority concede that if the case were to be reversed on the first charge this second one would have to be referred back to the territorial court. It is my view that there is no justification for any such remand or for any order other than a flat reversal and dismissal of the whole proceeding.

It would be hard to find a more frivolous charge than this second one relating to the affidavit. I shall touch upon that shortly, but first I make inquiry as to whether we may review action of the Hawaii court upon that second charge if we assume that it took any.

A reading of the majority opinion indicates that the court has no doubt of its power to review such a decision for it proceeds to review it at length. I thoroughly agree that we have such power. Our jurisdiction arises under §1293 of Title 28.[36] Most of what I have said heretofore demonstrates that we have here a case of violation of the Constitution. The Court of Appeals for the First Circuit operates under the same jurisdictional statute. It has often held that in a case which presents a federal question, the whole proceeding is reviewable, and the court has jurisdiction to decide "whatever questions of local law may be presented regardless of amounts in controversy." Mercado Riera v. Mercado

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[35]Convincing proof that the Hawaii court did not think it was passing on the second charge is the fact that Chief Justice Towse signed the opinion. It was his view that his court could not entertain this charge, and that it should be dismissed "as an interference with the administration of justice in the United States District Court for the District of Hawaii and a possible usurpation of the power thereof."

[36]"1293. Final decisions of Puerto Rico and Hawaii Supreme Courts —The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the Supreme courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs."

The next thing they decided was that if they were Communists they must have intended to overthrow the government. He said that he himself did not believe Kawano and he heard others say they did not believe Muller. He said that after they asked for the instructions they used the one which told them to decide first whether there was a conspiracy, and right off they decided there was, and then talked about whether defendants were members of the Communist Party. He said there was a lot of talk about Bailey.

"'After this conversation took place, when Jack Hall and I started to leave, Mr. Fuller begged Mr. Hall not to leave and raised his hands above his head and appeared to be praying although the words were not audible. Before leaving, Mr. Hall tried to quiet Mr. Fuller and helped Mrs. Fuller put her husband in bed. [451]

"'Mr. Hall and I again went to see Mr. Fuller on Sunday, June 28, shortly after 1:00 o'clock in the afternoon. We were accompanied on this occasion by Joseph Kealalio. When we arrived, Mr. Fuller was sitting in a chair in the living room. He kept looking at Mr. Hall but did not speak.

"'After conversing with Mrs. Fuller for a very short period of time, we came to the conclusion that it would be better to wait until Mr. Fuller was in better physical and mental condition.

"'When Mr. Hall started to leave, Mr. Fuller again pleaded with him not to leave.

"'Further affiant saith not.

"'/s/ HARRIET BOUSLOG.

Riera, 1 cir., 152 F. 2d 86, 92.[37] Moreover, this is a case "where the value in controversy exceeds $5000 exclusive of interest and costs." It is shown here, and the fact is not controverted, that one year of appellant's practice has a value to her of more than $5000.[38] That such facts give us jurisdiction was recognized by this court in Whittemore v. Farrington, 234 F. 2d 221. That was a case in which jurisdiction depended upon the value in controversy. The court found such jurisdiction was lacking because the most it could discover by way of value was some $1600 which one Edmund Leavy would have lost in trustee's fees. But in its footnote 7, (p. 225) it recognized the general principle applicable here: "For the general principle that the measure of the value in controversy, for purposes of testing the jurisdictional amount, in suits wherein the plaintiff seeks specific relief rather than damages, is the value of such relief to the plaintiff, see Hunt v. New York Cotton Exchange, 205 U.S. 322, . . . In First State Bank v. Chicago, R. I. & P. R. Co., 8 cir., 1933, 63 F. 2d 585, . . . the rule is applied to an action brought to abate other actions."

The same principle is often applied in passing upon the jurisdiction of a United States district court where it is dependent upon amount in controversy. Thus in an injunction suit designed to protect a business or property the necessary amount in controversy may exist notwithstanding there may be no prayer for damages. See Hunt v. New York Cotton Exchange, 205 U.S. 322, 336; Bitterman v. Louisville N. R. Co., 207 U.S. 205, 225; Gibbs v. Buck, 307 U.S. 66. I see no possible excuse for saying that the right to practice law is a privilege which is priceless and beyond value and hence there cannot be a value in controversy. If disbarment is sustained, Mrs. Sawyer will lose more than $5000 and that is all there is to it.

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[37] "We are not prepared to say that all of these federal questions are colorable and frivolous. Thus regardless of how we decide them, we have jurisdiction under §128 of the Judicial Code, supra, not only to consider them but also to go further and decide whatever questions of local law may be presented regardless of amount in controversy."

[38] This proof was made by affidavit in accordance with Title 28, §2108. See De La Torre v. National City Bank of New York, 110 F. 2d 381, 384, approving this procedure.

Appellant cannot be disciplined in the Hawaii court for conduct in connection with a case in the federal court which federal law holds proper. This case bears no resemblance to In Re Isserman, 9 N.J. 269, 87 Atl. 2d 903. In that case, the conduct condemned, besides the rape conviction, was iniquitous no matter where carried on. Here the Supreme Court of Hawaii expressly recognized that interviewing jurors after verdict was common practice for lawyers in Hawaii. Yet if Judge Chambers is right, it proceeded to impose a suspension of practice on appellant for following that common practice, all because of its rule stated to be a guide for counsel "thereafter". But such an order reaches even greater heights of absurdity. It suspends for conduct in connection with a federal case which the federal courts have recognized to be proper.

An able discussion of the propriety of procuring post-verdict affidavits from members of a jury is that of Judge Learned Hand in Jorgensen v. York Ice Machinery Corp., 2 cir., 160 F. 2d 432, 435. That was a case in which the court considered at great length affidavits of jurors presented in support of motions for new trial disclosing the deliberations in the jury room while the case was under submission. The court held that whether a new trial should have been granted was a matter within the judge's discretion, but the court assumed the propriety of procuring the testimony of the jurors as to what happened. Citing Mr. Wigmore's work on Evidence, the court criticized, as does Mr. Wigmore, the oft-quoted statement that jurors may not "impeach their verdict." The court cited McDonald v. Pless, 238 U.S. 264, 268, which discussed the propriety of the use of affidavits of jurors as to what happened in the jury room. That case stated: "Both of those decisions recognize that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'" Clyde Mattox v. United States, 146 U.S. 140, furnishes an instance in which the court held that affidavits of jurors were properly used to show overt acts in the jury room which are accessible to the knowledge of all the jurors.[39]

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[39]The whole subject of the use of such affidavits by jurors is treated at length by Wigmore, 3d Ed., Vol. 8, §§2352, 2354.

Since jurors' affidavits may thus be used on motions for new trial, a lawyer may of course interview the juror for the purpose of procuring the facts and the affidavits; otherwise they would be unobtainable. Of course it was the appellant here who made the affidavit. That affidavit is subject to the infirmity that it is hearsay. Even so, it would not be inappropriate to furnish such information to the judge; he might wish to pursue the inquiry himself. Cf. Remmer v. United States, 350 U.S. 377. But the appellant is not charged with the offense of presenting hearsay. (If that were an offense the ranks of the legal profession would indeed be decimated.) The impropriety charged here is Mrs. Sawyer's interview with the juror. Let it be conceded that if the juror Fuller had sworn to everything that was in appellant's affidavit, his testimony would not have furnished any basis for a new trial. But this is the first time I have ever heard it suggested that an attorney may be suspended from practice for attempting to present evidence of doubtful relevance or competency. The court below is without power to discipline appellant for acts done in a case in a federal court which, under the decisions of the federal courts, she had a right to do.

Suppose appellant had done much worse things. Suppose she had even been guilty of contempt of the court. The rule established by In Re Isserman, 345 U.S. 286, 290, and 348 U.S. 1, is that a lawyer is not subject to suspension or disbarment in any court merely because he has been convicted of contempt.[40]

Under Title 28, §2106, we may direct the entry of such appropriate judgment as may be just under the circumstances. The only appropriate or just judgment here is one dismissing the proceedings.

* * *

As is elsewhere apparent, the foregoing part of this opinion was written and circulated prior to the writing of Judge Barnes' concurring opinion. What I have said above sufficiently discloses why my view of the facts differs from that which he expresses.

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[40] "We do not recall any previous instance, though not venturing to assert that there is none, where a lawyer has been disbarred by any court of the United States or of a state merely because he had been convicted of a contempt." (345 U.S. 292) This is the opinion of the four Justices who were the majority at 348 U.S. 1. See footnote 34, supra.

Assuming that the dissenter normally writes last, I have only one word to add:

I think Judge Barnes in, as it were, dissenting from my dissent, has misunderstood my version of the facts. It will be noted that I said: "In my view there can be no other conclusion here than that the appellant's speech was an attack upon the Government's method of procedure in Smith Act cases including the one then on trial at Honolulu; and an attack upon the Smith Act generally." I did not say or suggest that appellant was not discussing the *pending* case. This is further plain from the fact that I treated at length, with reference to the Bridges, Pennekamp and Harney cases, the consequences of the appellant's attack relating to a *pending* case. Essentially my point has been that the speech must be read in context, and the context was all Smith Act cases, including this one. I cannot agree that an attack on a pending case is by reason of that fact an attack on the judge who presides in it.

STEPHENS, Chief Judge, dissenting.

I join Judges Pope and Hamley in dissenting to the majority decision of the Court.

(Endorsed:) Opinion, Concurring Opinion and Dissenting Opinion. Filed June 9, 1958.

Paul P. O'Brien, Clerk.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 6-11-58—200

APPENDIX B.

Opinion of the Supreme Court of the Territory of Hawaii.

In the Supreme Court of the Territory of Hawaii, October Term 1955.

No. 3044.

In the Matter of: Harriet Bouslog Sawyer, Also Known as Harriet Bouslog, an Attorney at Law.

Argued March 1, 1956. Decided April 6, 1956.

Towse, C. J.; Rice, J.; and Circuit Judge McKinley in Place of Stainback, J.; disqualified.

Per Curiam. This is a matter instituted in this court by the Bar Association of Hawaii, an unincorporated association, by a complaint filed herein on July 8, 1954, under former and then in effect Rule 19 of the rules of this court. The complaint alleged as follows:

"I.

"That Harriet Bouslog Sawyer, hereinafter referred to as the Licensee, is and at all times hereinafter mentioned continuously has been an attorney at law duly licensed and admitted to practice before all of the courts of the Territory of Hawaii and before the United States District Court for the District of Hawaii, and that the said Licensee is now and during all of said times herein mentioned has been a practitioner before said courts.

"II.

"That the said Licensee, while appearing as counsel of record for certain defendants in that certain case in [443] the United States District Court for the District of Hawaii entitled 'United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et al., Defendants,' being

Criminal Number 10495 in said court, during the course of the trial of said case, to wit, on or about December 14, 1952, did say during a speech to a public gathering in Honokaa, Hawaii, that horrible and shocking things were going on at said trial; that a fair trial was impossible; that all of the rules of evidence were being scrapped so the government could make its case; that the rules of evidence and procedure were made up as the case proceeded; and that unless the trial was stopped in its tracks certain new crimes would be created.

"III.

"That said Licensee did during the course of said trial and shortly after rendition of a verdict therein visit a juror who was known by her to be indisposed, and thereafter submitted her affidavit concerning an interview with said juror to the presiding judge under circumstances indicating a failure to comply with standards of professional conduct required of practitioners of law licensed to practice before this Court." (See Bill of Particulars, infra.)

Pursuant to the prayer thereof and to the provisions of said Rule 19, the complaint, contained in this court's secret file number 45, was on July 8, 1954, referred to the committee on legal ethics and unauthorized practice of the supreme court of the Territory of Hawaii.

The said committee to which the matter was referred, [444] subsequently designated and hereinafter referred to as the legal ethics committee, or as the committee, on September 21, 1954, entered an order, requiring the Bar Association of Hawaii, as complainant in the matter, to either file a bill of particulars or amend paragraph "III" of its complaint of July 8, 1954, making more specific its

charge therein set forth; and also requiring that on or before October 15, 1954, Harriet Bouslog Sawyer, also known as Harriet Bouslog, "file such special pleas as she wishes to present with respect to the jurisdiction of the Committee and the sufficiency of the complaint and on or before October 15, 1954, file such information as she wishes to present to clarify her request that the hearing of this matter should be postponed until after disposition of the Fujimoto case, supporting such statements by copies of the briefs, excerpts therefrom, or such other information as she deems advisable to show that the matter involved in the complaint filed in the above matter is the same as involved in the appeal of the Fujimoto case."

The Bar Association of Hawaii, by A. William Barlow, Esq., attorney, submitted a bill of particulars, dated the 29th day of September, 1954, which excepting the title of court and cause, was and is as follows:

"BILL OF PARTICULARS

"Pursuant to an Order entered on September 21, 1954, by the Legal Ethics Committee, the following Bill of Particulars is hereby furnished:

"1. Copy of the Affidavit of Harriet Bouslog, subscribed and sworn to before a notary public on the first day of July, 1953, signed by the Licensee Harriet Bouslog [445] and filed in the United States District Court for the District of Hawaii on July 1, 1953, in the case of United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto et al., Defendants, Criminal No. 10,495.

"'Affidavit of Harriet Bouslog

"'Territory of Hawaii,

"'City and County of Honolulu—ss.

"'I, Harriet Bouslog, being first duly sworn, on oath depose and say:

"'On Friday evening, June 26, 1953, shortly before 6:00 o'clock I received a telephone call at my home from Ellen Fuller Cabreros, sister of David P. Fuller who sat as a juror in the case of United States v. Fujimoto et al. Mrs. Cabreros asked me if I could come and see her brother; that he was seriously ill.

"'I went to the Fuller home at 1734 Colburn Street and was taken by Mrs. Cabreros and Mrs. Fuller into the front bedroom where Mr. Fuller was lying in bed. He appeared to be gravely ill.

"'I talked with his wife, Helen Fuller, in the living room of their home in the presence of Ellen Fuller Cabreros and her friend, Grace Oshiro, and two of the Fuller children. All members of the family present were upset and in tears at the state of Mr. Fuller. Mrs. Fuller stated that she had called a doctor to examine her husband and informed me that her husband had been ill since the return of the verdict, and particularly since early in the morning of Saturday, June 20, 1953, the morning after the verdict was returned.

"'Mrs. Fuller said that on Saturday morning, the day [446] immediately following the verdict of guilty in the Smith Act case, at about five o'clock in the morning, she found her husband on his knees praying, begging God for mercy, saying he had sinned, that he had lied in the eyes of God; that Jack Hall was innocent and the case was a frameup; that Jack Hall is a good man; that those people

are doing good for humanity and here someone is trying to block them. She said that in the time since, her husband had told her that the jury only looked at the Government's case and scarcely talked at all about the defendants' side and their case; that he asked her and the children to forgive him because he had done something wrong and it was too late; he said that one of the jurors said the defendants were innocent, and when the other jurors said, "Guilty, guilty," that juror threw a book across the room and said they just as well forget about it. Mrs. Fuller said that her husband had wanted to go see the judge and confess that he had lied, and once or twice tried to leave the house but was too upset mentally and physically and unable to leave the house by himself; that he fell and struck his head. She said that she and other members of her family urged him not to do anything, not to go to see the Judge and to forget about it, that he would only get himself in trouble and would get them in trouble, and that he might go to jail.

"'Mrs. Fuller said that when he tried to leave and was unable to, she and other members of the family put him back in bed and tried to keep him quiet; that he kept shouting and crying and praying saying that the case was a frameup, that he had done wrong, and told the children and her to stay away from him because he was not clean. She said that [447] his condition seemed to get worse and worse as the days went by until on Friday, June 26, 1953, all day he was in bed and did not move or get up at all, and his voice became scarcely a whisper because he was hoarse from the shouting on previous days.

"'After the conversation with Mrs. Fuller, I went in the bedroom where Mr. Fuller was and asked him if he wished a drink of water. He nodded that he did.

During this time, Mrs. Fuller, his sister and her friend were present in the room. Mr. Fuller struggled to talk and make himself heard but because of his weakened physical condition and the loss of his voice, it was difficult to understand what he said. He stated understandably, however, that he wanted help and wanted to get a clear conscience and get the wrong he had done straightened out.

"'Shortly after my arrival, a Doctor Chang arrived. I was not present in the bedroom during the conversation between Dr. Chang and Mrs. Fuller, although I could hear the conversation between Dr. Chang and Mrs. Fuller from the living room. After Dr. Chang had talked to Mrs. Fuller, Mrs. Fuller told me that the doctor said after examining her husband that there was nothing physically wrong with him, that he would have to rest in bed, and that it might be necessary to take him to a hospital unless he would get up to go to the bathroom.

"'After the doctor had left, in the presence of Mrs. Fuller, Mrs. Cabreros and her friend, Grace Oshiro, and Mrs. Fuller's eldest daughter, I gave Mr. Fuller water and he was propped up in bed. Again he tried to talk but seemed to find difficulty in doing so. He said he wanted [448] to talk about the matter and would talk to Jack Hall or anyone at any time to get a clear conscience.

"'Shortly after this I left, believing Mr. Fuller needed rest. I made arrangements with Mrs. Fuller and Mr. Fuller to come to see him the next day with Jack Hall.

"'On Saturday morning I was informed by Mrs. Cabreros that her brother was feeling considerably better and wanted to and would be able to see us.

"'When Mr. Hall and I arrived at the Fuller home about 1:00 o'clock Saturday afternoon, June 27, Mr. Hall

put out his hand to Mr. Fuller, Mr. Fuller looked at Mr. Hall for a long time and finally took his hand. Mr. Hall told Mr. Fuller he did not hold anything against him; that he just wanted Mr. Fuller to get well.

"'Mr. Fuller said to Mr. Hall that from the talk of guilty by other jurors in the jury room, he believed he had to vote guilty to protect his brothers because he was afraid they would be fired if he did not. Mrs. Fuller said that both of Mr. Fuller's brothers, Leonare and Harry, worked for Isle-Ways. Mr. Fuller said that it wasn't right that they only looked at Government exhibits and not at the defendant's exhibits or case. He said it was a frameup and said he blamed himself. He said that they looked at Government exhibits and any time someone suggested looking at defense exhibits some juror would say, "Later, later," and they never got around to it. He said that he knew and believed the defendants were innocent all the time but was afraid of what would happen if he voted not guilty.

"'He said that the jury in their deliberations decided that the Communist Party was a conspiracy within the [449] "first hour after they began their deliberations. He said that the instruction of the Judge which they used to decide this was the one which told them first to decide whether there was a conspiracy, and they decided the Communist Party was a conspiracy. He said he knew from what he heard the defendants were convicted before the case started on ideas the jurors had before the case started. He said he heard two jurors tell the Judge that they were opposed to Communism during the examination. He said that no secret ballots were taken, so everyone knew how each juror voted. He said some of the jurors said the Government wouldn't bring the charge

"'Subscribed and sworn to before me this 1st day of July, 1953.

"'[Seal] /s/ J. D. MARQUES,

"'Notary Public, First Judicial Circuit, Territory of Hawaii.

"'My commission expires: July 15/53.'"

"The Complainant Bar Association neither affirms nor denies the truth or falsity of the allegations and facts contained in the affidavit filed by the Licensee Harriet Bouslog. The Complainant informs the committee that the above-recited affidavit, its contents, and the manner in which it was obtained furnishes the basis for the charge against the Licensee Harriet Bouslog and that the Complainant will introduce evidence in elaboration [452] of and in corroboration of the charge indicating a failure by the Licensee Hariet Bouslog to comply with standards of professional conduct required of practitioners before this Court and which unprofessional and unethical conduct is condemned in Opinion 109 issued March 10, 1934, by the Committee on Professional Ethics and Grievances by the American Bar Association and by Judge Prettyman in the case of Rakes vs. United States, 169 F. 2d at pages 745 and 746 and other related cases.

"Dated: Honolulu, T. H., this 29th day of September, 1954."

By letter dated October 14, 1954, addressed to the chairman of the legal ethics committee, J. Garner Anthony, then attorney for Harriet Bouslog, advised the committee as follows:

"This is to advise you that Mrs. Bouslog will present no special plea to the jurisdiction of the Committee nor

does she propose to file any material or argument in support of her prior request for a continuance until the disposition of Fujimoto, et al., v. United States; No. 13,195.

"If the Committee believes it appropriate to hear this matter in advance of a determination of the Fujimoto case, we are ready to proceed. Our only request is that the matter be heard before the full Committee."

Thereafter proceedings were had before the said committee and the latter subsequently, to wit, on July 1, 1955, filed herein, under the aforesaid secret file number 45, its report, wherein the committee expressed an unanimous opinion that the Bar Association of Hawaii had sustained the allegations in paragraphs "I" and "III" of its complaint; that in her comments made at Honokaa (as alleged in paragraph "II" of [453] the complaint) the respondent licensee ("Mrs. Bouslog") imputed to the judge unfairness in the conduct of the trial (of the case of United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et als., Defendants, Criminal 10,495, United States District Court for the District of Hawaii); impugned the integrity of the local Federal courts and made other comments and thus was guilty of violation of canons 1 and 22 of the canons of professional ethics of the American Bar Association and should be disciplined for the same; also, that there were * * * "differences of opinion within the Committee as to whether her interviews with juror Fuller were proper, as to whether they were in violation of Canon 23 of the Canons of Ethics and as to whether she should be disciplined, although the majority thinks she should be disciplined with respect to the charges in paragraph III" of the complaint.

Attached to and submitted with the report of the committee was a separate written statement by one member

of the committee, wherein he expressed concurrence in the findings of the committee that the conduct of the respondent licensee was, with respect to the Honokaa speech and with respect to the matters concerning the juror, improper; and nonconcurrence in the conclusion of the other members of the committee with respect to the recommendations the committee should make to the court; and expressing his view that the then rule 19 of the rules of this court required that the committee, when recommending disciplinary action should go further and recommend "the nature of the discipline it feels is proper." He recommended that, "for the improper conduct of Mrs. Bouslog with reference to the Honokaa speech, she be suspended from the practice of law for such period of time as the Court may deem just and proper"; and that [454] for her conduct regarding the juror which the committee had found improper "she be reprimanded."

Included with the report of the said committee and therewith returned secret file number 45 were: the complaint of the Bar Association of Hawaii against the licensee; the pleadings and memoranda which had been filed since the complaint, to wit, petitioner's (Bar Association of Hawaii's) exhibits 1, 2 and 6 and licensee's exhibits B, C, D, E, F and G introduced at the hearings before the committee, with the notation by the chairman of the committee that petitioner's exhibits 3, 4 and 5, copies of newspapers presented at the hearing before the committee on December 2, 1954, were subsequently withdrawn.

After consideration of the said committee's report, on July 8, 1955, this court issued to said licensee, Harriet Bouslog Sawyer, also known as Harriet Bouslog, an order to show cause, if existing, why the findings, conclusions and recommendations of the committee should not be

adopted. Then, the matter was removed from the secret file as number 45 thereof and became number 3044 of the regular files of this court.

By order of court dated the 8th day of July, 1955, and filed herein on July 12, 1955, attorney A. William Barlow, member of the Bar of this court, was designated to, in conjunction with the attorney general of the Territory of Hawaii, present the cause on behalf of the compainant, the Bar Association of Hawaii.

On July 27, 1955, by order of the Chief Justice of this court the licensee was granted an extension of time to September 19, 1955, within which to answer the order to show [455] cause theretofore issued. Subsequently, upon motions or requests on her behalf, further extensions of time were granted to the licensee to and including November 7, 1955, within which to file her return to the order to show cause and hearing on the latter was set for November 8, 1955.

On October 19, 1955, J. Garner Anthony, Esq., who had been of counsel for licensee at hearings before the committee and herein, filed a withdrawal as counsel, such bearing date of October 18, 1955.

On October 19, 1955, the licensee, therein referred to as "respondent"—"by way of return to the order to show cause issued on July 8, 1955"—moved to dismiss the order to show cause, upon several grounds therein set forth. Such motion was contested, a memorandum in opposition thereto having been filed on behalf of the complainant on October 26, 1955. To the latter a memorandum in opposition was filed on October 28, 1955. Argument on the motion and pertinent memoranda was heard, in open court on November 3, 1955, before the Chief Justice and Jus-

tices Stainback and Rice. At the conclusion of the argument the motion was by the court denied, the Chief Justice dissenting in part and concurring in part.

The licensee (as respondent) was then granted to and including November 7, 1955, within which to file her return to the order to show cause and hearing thereon was set for November 8, 1955.

On November 4, 1955, conference was had between the justices and counsel upon a request that additional time be granted to the licensee to obtain mainland counsel to represent her. At the conclusion of such conference the return to the order to show cause was set forward to December 2, 1955, and [456] argument on the case set for January 9, 1956, at 9:00 a.m.

A motion for reconsideration was filed on November 7, 1955, by Myer C. Symonds, Esq., on behalf of the licensee. Such motion was argued on November 14, 1955, before this court, consisting of the Chief Justice and Justices Stainback and Rice.

On November 29, 1955, there was entered and filed an order denying the motion to dismiss the order to show cause, Chief Justice Edward A. Towse dissenting in part upon the ground that the charges premised upon the Fuller affidavit should be dismissed "as an interference with the administration of justice in the United States District Court for the District of Hawaii and a possible usurpation of the power thereof."

On December 2, 1955, there was filed on behalf of the licensee, by Myer C. Symonds, Esq., her attorney, a return to the order to show cause.

On December 7, 1955, there was filed, on behalf of the licensee, a motion for continuance, together with a notice

thereof, the motion being based upon an affidavit of John T. McTernan, Esq., and an affidavit of Harriet Bouslog, the licensee.

On December 12, 1955, argument was had on the said motion for continuance filed on December 7, 1955. The motion was denied and the court reiterated that the hearing on the order to show cause would stand as previously set for hearing on January 9, 1956, at 9:00 a. m.

On January 9, 1956, a pretrial conference was had in the chambers of the Chief Justice, he being present and also Justices Stainback and Rice, as the court, and Attorney General Edward N. Sylva, Deputy Attorney General Morio Omori, and A. William Barlow, Esq., on behalf of the complainant, and attorneys John T. McTernan and Myer C. Symonds, on behalf of the respondent [457] licensee. Subsequent to said first pretrial conference, to wit, on January 11, 1956, there were filed on behalf of the respondent licensee a suggestion of disqualification of Mr. Justice Stainback and also a suggestion of disqualification of Mr. Justice Rice, the two associate justices of this court. A memorandum in opposition to said suggestions of disqualification of the justices was filed on behalf of the Bar Association of Hawaii by the attorneys above named as appearing on its behalf at the pretrial conference on January 9, 1956.

Argument on the two suggestions of disqualification and the memorandum in opposition thereto was set for January 12, 1956, but was continued to and heard on January 16, 1956, and at the conclusion thereof the subject matter was taken under advisement.

Subsequently—see opinion of the court by Stainback, J., concurring opinion of Rice, J., and dissenting opinion

of Towse, C. J., filed together on January 19, 1956—the court rejected the affidavits upon which the suggestions for disqualification were based and held: "that neither Mr. Justice Stainback nor Mr. Justice Rice is disqualified," for reasons set forth and summarized as follows:

"1. The provisions of section 9573 of the Revised Laws of Hawaii 1945 relating to disqualification of judges because of bias or prejudice are not applicable to justices of the supreme court; however, a justice in addition to being disqualified by reason of relationship, pecuniary interest or previous judgment as set forth in section 84 of the Organic Act, may excuse himself from participating in a case where he feels that fairness and justice require such withdrawal." [458]

"2. The suggestions of disqualification of the justices for bias or prejudice were not timely made; in fact, not until after affiant had received an adverse ruling on the sufficiency of the complaint did she make her affidavit of bias and prejudice against the two justices ruling against her. Would it be unreasonable or unfair to infer that these affidavits were made because she had tried the "pool of litigation" with her toe and found it too cool for a plunge, as did the little boy testing the temperature of the water? (State vs. Armijo, *supra.*)

"3. The affidavit attempting to disqualify Mr. Justice Stainback is at least technically defective and that referring to Mr. Justice Rice is not only technically defective but does not in the remotest degree set forth any facts which would show such personal bias or prejudice against the affiant."

However, because of a statement which he had previously made to a committee of the United States Senate

(which he quoted in the aforesaid opinion of the court by him) Mr. Justice Stainback said: "I, therefore, shall take no part in the hearings of this matter [the proceedings herein against the respondent licensee] upon its merits but respectfully suggest that a substitute be selected to serve in my stead."

Mr. Justice Stainback having withdrawn, pursuant to the provisions of law, the remaining justices, the Chief Justice and Mr. Justice Rice, requested and authorized the Honorable Frank A. McKinley, fourth judge of the circuit court of the first circuit, Territory of Hawaii, to sit with them temporarily in place of Associate Justice Ingram M. Stainback, to hear and [459] determine this said cause, commencing on January 20, 1956.

Therefore, from and inclusive of January 20, 1956, and throughout the remainder of proceedings herein, this court was comprised of Mr. Chief Justice Edward A. Towse, Mr. Justice Philip L. Rice, and Circuit Judge Frank A. McKinley, the latter substituting for Mr. Justice Stainback.

Before the court as comprised as last aforesaid, pretrial hearings, at which were present A. William Barlow, Esq., attorney for the Bar Association of Hawaii; Honorable Edward N. Sylva, Attorney General, Territory of Hawaii; and John T. McTernan, Esq., and Myer C. Symonds, Esq., attorneys for the respondent licensee, were held on January 20 and 23, 1956. Thereat it was determined that from the filing with this court of the report of its said legal ethics committee and the thereupon issuance of this court's order to the respondent licensee to show cause, if existing, the proceedings instituted by the Bar Association of Hawaii against the said respondent licensee had come

before this court for trial de novo. Also that, in lieu of the taking anew of testimony and evidence in this proceeding before this court, the cause would, the respondent licensee consenting through her attorneys, be submitted upon the record which had been developed by and before the aforesaid committee and this court would file a pretrial order conformable to such determination.

On February 6, 1956, the pretrial order was entered and filed.

It was thereby ordered:

"1. The record upon which this matter is to be submitted to the Court and determined by it is the following: [460]

"a. The Complaint of the Bar Association of Hawaii, dated July 8, 1954.

"b. The Bill of Particulars submitted by the Bar Association of Hawaii dated September 29, 1954.

"c. The Report of the Legal Ethics Committee to this Court dated June 9, 1955.

"d. The Order to Show Cause made and entered by this Court on July 8, 1955.

"e. The Return to the Order to Show Cause of Harriet Bouslog, respondent, dated December 2, 1955.

"f. The transcript of all proceedings before said Legal Ethics Committee, including the testimony adduced and the exhibits offered and received.

"g. And all motions, briefs and memoranda of law heretofore filed with this Court herein.

"2. The Court will consider the matter, as submitted on the record, disregarding those portions thereof not bearing on the charges set forth in the said Complaint.

"3. The parties hereto will file and exchange briefs on or before February 23, 1956.

"4. The Court will hear oral argument on Thursday, March 1, 1956, beginning at 9:00 o'clock a. m."

Pursuant to the pretrial order, *supra*, the entire record specified therein, with transcript of oral testimony presented before and heard and the exhibits admitted in evidence by the said legal ethics committee has and have been submitted to this court for scrutiny and evaluation; the parties filed and exchanged briefs on February 23, 1956, and oral argument was heard in open court on March 1, 1956. At the conclusion of the oral argument the matter was taken under advisement by this court. [461]

This court has scrutinized the record, the transcript of oral testimony and the exhibits aforesaid, read the briefs filed, examined the cases cited therein, and considered them with the oral arguments presented on March 1, 1956, and has since made its own evaluation thereof, inclusive and particularly of the evidence, and has drawn its own conclusions therefrom, unprejudiced by the report of the legal ethics committee, which made no comment on the relative credibility accorded by such committee to the witnesses, severally, or the weight given by the committee to the exhibits.

The court has noted in the record and particularly in the transcript of her testimony that the respondent licensee has exhibited an evasiveness and a lack of frankness as to her actions and sayings which were under investigation and inquiry. When confronted with testimony of witnesses who were of her audience at her speech in Honokaa, Hawaii, on or about December 14, 1952, and which testimony was to the effect that she had made the

statements attributed to her in paragraph "II" of the complaint of the bar association, she did not categorically deny making such statements, but equivocated by saying in effect that she had no recollection of making them and also that they were not indicative of language she would have used. However, she admitted authorship of the pamphlet, entitled "Fear," a copy of which was admitted in the proceedings before the legal ethics committee and is a part of the record, as exhibit 6 and comparison of the language used therein with the language attributed to her in her Honokaa speech reveals great similarity.

It is the finding and conclusion of this court that the allegations contained in the complaint of the Bar Association of Hawaii, more particularly paragraphs "I." "II," and "III" [462] thereof and the aforesaid bill of particulars pertinent to the last mentioned, have been sustained by convincing proof, by credible evidence of more than a mere preponderance; that the said respondent licensee, a member of the Bar of this court and an attorney at law, duly licensed and admitted to practice before all of the courts of the Territory of Hawaii and, also, before the United States District Court for the District of Hawaii, did, as charged in said paragraph II, being then an attorney of record for a defendant in a then pending case in the United States District Court for the District of Hawaii entitled "United States of America, Plaintiff, vs. Charles Kasuyuki Fujimoto, *et al.*, Defendants," being criminal number 10,495 in said court, during the course of trial of said case, to wit, on or about December 14, 1952, say during a speech to a public gathering in Honokaa, Hawaii, that horrible and shocking things were going on at said trial; that a fair trial was impossible; that all of the rules of evidence were being scrapped so the govern-

ment could make its case; that the rules of evidence and procedure were made up as the case proceeded; and that unless the trial was stopped in its tracks certain new crimes would be created. Also, that, as charged in said paragraph III and the bill of particulars pertinent thereto, said licensee did—at the request of the juror's sister—shortly after rendition of a verdict in said case visit a juror and interrogated him, David P. Fuller, known to licensee as being indisposed, with respect to what may have transpired in the jury room, when the jury was therein for the purpose of considering the evidence and arriving at a verdict in the said case, which interviewing of the said juror was set forth in a subsequent affidavit by the said licensee, a copy [463] of which was and is incorporated in the aforesaid bill of particulars with respect to said paragraph III of the complaint of the bar association.

Upon its finding and conclusion as stated, *supra,* this court deems that in saying what she did in her speech to a public gathering at Honokaa, Hawaii, on December 14, 1952, as aforesaid, when there was then pending in the United States District Court for the District of Hawaii a case under the Smith Act, to wit, the case entitled "United States of America, Plaintiff, vs. Charles Kasuyuki Fujimoto, *et als.,* Defendants," being criminal number 10,495 in said court, she engaged and participated in a wilful oral attack upon the administration of justice in and by the said United States District Court for the District of Hawaii and by direct statement and implication impugned the integrity of the judge presiding therein and in the said pending case, within the territorial boundaries of the Territory of Hawaii, and thus tended to also create disrespect for the courts of justice and judicial officers generally, *contra* to the obligations and duties assumed,

as incident to the license, by her and by every person to whom a license has or shall have been issued by this court to practice in the courts of the Territory of Hawaii. She has thus committed what this court considers gross misconduct.

Wherefore, in the exercise of its inherent and statutory disciplinary power, this court orders that, for one year commencing from and next succeeding the entry of judgment herein, the said Harriet Bouslog Sawyer, also known as Harriet Bouslog, be suspended and prohibited from practice—either directly or indirectly and in any manner—in all and every one of the courts of the Territory of Hawaii, as an attorney at law, counsellor, [464] solicitor and proctor thereof; and that she also pay all costs and expenses incurred in, or incident to, the proceedings herein.

It is further ordered: that, the said Harriet Bouslog Sawyer, also known as Harriet Bouslog, forthwith surrender to a clerk of this court the license heretofore issued by the court to her, dated December 23, 1941, and that said clerk thereupon place and retain such license, together with a certified copy hereof in an appropriately marked file of the court; also, that upon entry of judgment herein, an appropriate entry thereof be made in and upon the roll of attorneys licensed by this court to practice in all courts of the Territory of Hawaii.

It appears from the transcript which we have examined pursuant to the pretrial order herein, that her first visit to said David Fuller was made by the respondent licensee upon request by his sister. It also appears that it has not been uncomon, if not in fact common practice, heretofore and within the Territory of Hawaii, for attorneys as well as others to interrogate jurors, after rendition of verdict

by them, as to what may have been decisive in reaching a verdict.

However, even if she relied upon the request of his sister when she first visited David Fuller, and upon a belief that it was common practice, locally, to interrogate trial jurors after verdict, such reliance thereon is not acceptable as excuse for her repeated visits to and studied interrogation of Fuller under the circumstances and as set forth in her affidavit, incorporated in the bill of particulars. In this connection, we quote from and adopt as a declaration of the view of this court, the following extract from the opinion of the court in Rakes ys. United States, 169 F. (2d) 739 (4th Cir. [465] 1948):

"We are impelled to add a further word upon this matter. The inviolability of the jury room from outside influence of any sort, actual or potential, is a prime necessity in the administration of justice. That unqualified rule requires that if a person, whether on the jury or not, knows of such outside influence, or an attempt at it, he must at once report his information to the court. The same rule requires that jurors are not to be harassed in any manner because of a verdict they have rendered. If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room. He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice. Much of such conversation and inquiry may be idle curiosity, and harmless, but a search-

ing or pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned. It is incumbent upon the courts to protect jurors from it."

Let it be known that one acts at his peril: (1) who within the jurisdiction of the courts of the Territory of Hawaii hereafter, either directly or indirectly, without good cause shown to and express authorization of a court of record, or a judge thereof, interrogates one who has been, as well as one then being, a juror of a trial jury in any case, as to any occurrence in the room wherein and during the time when the trial [466] jury shall be, or have been, secluded therein for the purpose of conference or deliberation and an endeavor to reach a verdict; or (2) who shall after verdict interrogate one, who has been a juror of any said jury, as to what may have been persuasive in reaching the verdict, or upon what the jury based it.

However, in the instant matter, this court will let its hereinbefore expressed disciplinary order—suspending the said respondent licensee from the practice of law in the territorial courts for one year and requiring her to pay costs—suffice, although also deeming gross misconduct her said repeated interviews with and interrogations of David Fuller.

It has been indicated to this court that as the proceedings herein have been with respect to the conduct—which we have found to be gross misconduct—of the respondent licensee, the said Harriet Bouslog Sawyer, also known as Harriet Bouslog, in connection with or relation to a case in a Federal court, to wit, the case of the "United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, *et als*, Defendants," criminal number 10,495, in the United States District Court for the District of Hawaii, this Supreme Court of the Territory of Hawaii should not

have taken cognizance thereof and assumed and exercised jurisdiction in the instant matter.

We cannot accept that view of the situation. The respondent licensee is a member of the Bar of this and all other courts of the Territory of Hawaii, by virtue of a license issued to her by the Supreme Court of the Territory of Hawaii which license was by the express language thereof to be in effect "during good behavior." Therefore, the behavior of the respondent licensee as an attorney is ever a concern of the licensing court. See *In re* Isserman, 9 N. J. 269, 87 A. (2d) 903. [467]

Appended hereto and by reference incorporated herein and made a part hereof is a memorandum of other cases in re disciplinary proceedings against attorneys, which cases—as well as others—have had our consideration in connection with the instant matter.

Let judgment be entered pursuant hereto and in conformity herewith.

/s/ EDWARD A. TOWSE,
/s/ PHILIP L. RICE,
/s/ FRANK A. MCKINLEY.

A. William Barlow (Also on the Briefs) for the Bar Association of Hawaii, Complainant.

Edward N. Sylva, Attorney General, and Morio Omori, Deputy Attorney General (Also on the Briefs) for the Territory.

John T. McTernan and Myer C. Symonds (Also on the Briefs) for Respondent-Licensee Harriet Bouslog Sawyer, also known as Harriet Bouslog. [468]

Concurring Opinion of Circuit Judge McKinley.

I concur with the majority in the finding of gross misconduct on the part of respondent, but would change the disciplinary action to that of disbarment.

/s/ FRANK A. MCKINLEY. [469]

MEMORANDUM OF ACTION BY COURTS IN RE DISCIPLINARY PROCEEDINGS AGAINST ATTORNEYS.

1. *In re* Isserman, 1952 N. J.
   (Disbarment.)
2. *In re* Ades, 1934 U. S. D. C., Md.
   (Reprimand.)
3. Bar Ass'n v. Philbrook, 1934 Cal.
   (Disbarment.)
4. *In re* Bevans, 1929 N. Y.
   (Suspension—1 year.)
5. *In re* Breen, 1908 Nev.
   (Disbarment.)
6. Bar Ass'n v. Metzen, 1919 Ill.
   (Disbarment.)
7. *In re* Chopak, 1946 U. S. D. C., N. Y.
   (Suspension—3 years.)
8. Cobb v. U. S., 9th Cir., 1909.
   (Suspension—18 months.)
9. Duke v. Comm. on Griev., 1936 D. C.
   (Disbarment.)
10. *In re* Dunn, 1909 Neb.
    (Indefinite suspension.)
11. *In re* Egan, 1909 S. D.
    (Readmission denied.)

12. *In re* Graves, 1923 Cal.
(Suspension; period not mentioned in case.)
13. *In re* Hanna, 1924, N. M.
(Suspended by District Court; reprimanded.)
14. *In re* Hilton, 1916 Utah.
(Disbarment.)
15. *In re* Humphrey, 1917 Cal.
(Suspension—2 years.)
16. Johnson v. State, 1907 Ala.
(Disbarment.)
17. Ky. State Bar v. Lewis, 1955.
(Suspension—Six months.)
18. *In re* Knight, 1942 N. Y.
(Disbarment.)
19. Lewis Co. Bar Ass'n v. Willis 1917.
(Suspension—1 year.)
20. *In re* Mains, 1899 Mich.
(Disbarment.)
21. *In re* Meldrum, 1952 Iowa.
(Suspension—1 year.)
22. *In re* Mitgang, 1944 Ill.
(Censured.)
23. *In re* Palarine, 1945 Minn.
(Dismissed.)
24. Colo. Bar Ass'n v. Ginsburg, 1930.
(Suspension—1 year.)
25. *In re* Richeson, 1946 Ariz.
(Disbarment.)
26. *In re* Robinson, 1907 Wash.
(Suspension—Six months.)
27. *In re* Rogers, 1923 N. M.
(Suspension—Six months.)

28. *In re* Snow, 1904 Utah.
(Suspension—Two months.)
29. Snyder's Case, 1930 Pa.
(Suspension—1 year.)
30. State v. Brekenridge, 1927 Okla.
(Suspension—One month.)
31. *In re* Kirby, 1915 S. D.
(Dismissed.)
32. State v. Root, 1896 N. D.
(Dismissed because of irregularities.)
33. State Bar Comm. v. Sullivan.
(Disbarment.)
34. State Bd. of Law v. Hart, 1908.
(Suspension—Six months.)
35. State Bd. of Law v. Spriggs, 1945.
(Suspension—Six months.)
36. Neb. Bar Ass'n v. Price, 1944.
(Dismissed; lack of particulars.)
37. *Ex parte* Steineman, 1880 Pa.
(Reversed lower court.)
38. *In re* Troy, 1920 R. I.
(Suspension—2 years.)
39. U. S. v. Green, 1898 C. C. D. Colo.
(Disbarment.)
40. U. S. v. Markewich, 1919 S. D.
(Censured.)
41. Wilhelm's Case, 1921 Pa.
(Disbarment.)
42. *In re* Wright, 1951 Nev.
(Suspension—Six months.)

43. *In re* Barenaba, 5 Haw. 279 (1885)
(Suspension—Three months.)
44. *In re* Paakiki, 8 Haw. 518 (1892)
(Suspension—2 years.)
45. *In re* Thompson, 15 Haw. 155 (1903)
(Suspension—1 year.)
46. *In re* Bevins, 26 Haw. 570 (1922)
(Suspension—Three months.)
47. *In re* French, 28 Haw. 47 (1924)
(Disbarment.)
48. *In re* Lyman, 30 Haw. 405 (1928)
(Disbarment.)

[Endorsed]: Filed April 6, 1956 [470]

In the Supreme Court for the Territory of Hawaii,
October Term, 1955

No. 3044

In the Matter of
HARRIET BOUSLOG SAWYER, Also Known as HARRIET BOUSLOG, an Attorney at Law.

JUDGMENT

This cause having been considered by this Court upon the entire record specified by the Pre-Trial Order entered on February 6, 1956, and the parties having filed their respective briefs on February 23, 1956, and having presented oral argument in open court on March 1, 1956, and upon the findings of fact and conclusions of law set forth in the Per Curiam Opinion filed in this Court on April 6, 1956, It Is Ordered, Adjudged and Decreed:

1. That Harriet Bouslog Sawyer, also known as Harriet Bouslog, be suspended and prohibited from practice, either directly or indirectly and in any manner whatsoever, in all and every one of the courts of the Territory of Hawaii, as an attorney at law, counsellor, solicitor and proctor thereof, for a period of one year from the date hereof.

2. That Harriet Bouslog Sawyer, also known as Harriet Bouslog, forthwith surrender to a clerk of this court the license heretofore issued by the court to her, dated December 23, 1941, and that said clerk thereupon place and retain such license, together with a certified copy hereof, in an appropriately marked file of the court, and that an appropriate entry thereof be made in and upon the roll of attorneys licensed by this court to practice in all courts of the Territory of [472] Hawaii.

3. That Harriet Bouslog Sawyer, also known as Harriet Bouslog, pay all costs and expenses incurred in, or incident to, the proceedings herein.

Dated at Honolulu, T. H., this 7th day of April, 1956.

[Seal]

/s/ EDWARD A. TOWSE,
Chief Justice,

/s/ PHILIP L. RICE,
Associate Justice,

/s/ FRANK A. McKINLEY,
Substitute Justice.

[Endorsed]: Filed April 7, 1956. [473]

APPENDIX C.

Pertinent Portions of Rule 19, Rules of the Supreme Court of the Territory of Hawaii, as Amended, October 31, 1953.

19. RULE GOVERNING PROCEEDINGS TO STRIKE ATTORNEY'S NAME FROM ROLL AND THE UNLAWFUL OR UNAUTHORIZED PRACTICE OF LAW.

1. Complaints against members of the bar for improper or unprofessional conduct shall be in writing and filed in triplicate by the attorney general, any of his deputies, or any person aggrieved by the conduct of any attorney licensed to practice in any territorial court, with the clerk of the supreme court of the Territory of Hawaii, who shall keep the same in a secret file available only to the justices of the supreme court, the person charged, and the committee to which the court may have referred the matter for investigation as hereinafter provided.

Such complaint need not be formal but shall be in writing and set forth with reasonable certainty the time, place and circumstances of the alleged misconduct, and if filed by anyone other than the attorney general or one of his deputies, it shall be verified under oath, and the court may require the same to be made more specific.

If the court deems that the complaint sets forth a *prima facie* case of misconduct warranting investigation, it may refer the same to a standing committee, to be known as Committee on Legal Ethics, consisting of three members of the bar, appointed by the court for investigation. The members of said committee shall hold office at the pleasure of the court. Such committee shall furnish the accused person with a certified copy of the complaint which shall be prepared by the clerk of the supreme court. Any at-

torney complained of may file an affidavit of bias and prejudice with the court concerning any member of the committee at any time prior to the commencement of the hearing by the committee. If the court shall find the same well-founded the court shall appoint another person to such committee to replace the member thus disqualified.

Such committee is hereby empowered and charged to investigate and take proof concerning such complaint. The hearings before the committee shall be private, unless the attorney charged shall request that they be public. The person charged shall be entitled to be present at every hearing of the committee and to be represented by counsel, to cross-examine witnesses, and to submit such evidence as he desires. Upon request of the committee, this court may assign a reporter of the circuit court to take and transcribe shorthand notes of the testimony, and a clerk of the circuit court to administer oaths, in the same manner as before a circuit judge.

Upon application by such committee, the clerk of this court shall issue writs of subpoena *ad testificandum,* writs of subpoena *duces tecum* or *dedimus potestatem* to take depositions. Any person failing to obey any such subpoena shall be in contempt of this court and subject to punishment accordingly.

At the end of the hearing, the committee shall make report to this court of its findings of fact and conclusions of law and file therewith the record of such hearing, all of which shall be kept by the clerk in a secret file available

only to the attorney charged and to the justices of the supreme court. The attorney charged shall, upon request, be entitled to receive from the clerk of the supreme court a certified copy of the committee's report and the record of the hearings had before the committee. If the committee shall recommend disbarment or other discipline, the matter shall then be docketed, made a matter of public record, and entitled in the name of the attorney charged, and thereupon an order shall issue from this court to the attorney charged to show cause, if any he has, why the findings and conclusions of the committee should not be adopted, and such judgment as the court may deem proper entered. When the rule shall be answered the court shall fix the time for hearing, and may designate the attorney general or one of his deputies or any member of the bar of this court to present the case on behalf of the complainant. The matter shall be tried *de novo* by the court, and such judgment shall be entered as the court shall deem proper.

APPENDIX D.

Pertinent Portions of Rule 19, Rules of the Supreme Court of the Territory of Hawaii as Amended, April 21, 1954.

RULE 19. IMPROPER OR UNPROFESSIONAL CONDUCT AND UNAUTHORIZED OR UNLAWFUL PRACTICE OF LAW.

1. Complaints of improper or unprofessional conduct by any attorney licensed to practice in any court of the Territory of Hawaii (hereinafter referred to as the licensee) or of any unauthorized or unlawful practice of law by any individual, partnership, corporation or other entity (hereinafter referred to as the person charged) may be filed in this Court by the Attorney General, the Bar Association of Hawaii (hereinafter referred to as the Bar Association) or any person aggrieved.

The complainant shall, if other than the Attorney General or the Bar Association, verify the complaint under oath. An original and five (5) copies of the complaint shall be filed with the Clerk of this Court (hereinafter referred to as the Clerk), who shall keep the same in a secret file available only to the Court and to such other persons as herein provided.

The Court shall refer the complaint to its Committee on Legal Ethics and Unauthorized Practice (hereinafter referred to as the Committee), which shall consist of seven (7) members of the Bar of this Court, of whom five (5) constitute a quorum. Members shall be appointed by and hold office at the pleasure of the Court. The Court shall designate the Chairman. The Committee shall hold its hearings in the courtroom of the Court. All expenses incurred by the Committee in connection with

its hearings shall be borne by the Court. The Committee shall be empowered, subject to the approval of the Court, to formulate rules for the government of its procedure.

The Committee shall cause the licensee or the person charged to be served, in the manner provided by law, with a copy of the complaint, together with a notice of the time and place of hearing. Due return of the service of the complaint and notice shall be filed with Committee. If the complaint shall have been filed by other than the Bar Association, a copy of the complaint and notice shall be furnished the President of the Bar Association and the Bar Association shall thereafter be permitted to appear at any hearing before the Committee or proceeding before the Court as *amicus curiae*.

The licensee or person charged shall have the right within ten (10) days prior to the date set for the commencement of the hearing to file an affidavit of bias and prejudice concerning any member or members of the Committee. All challenges raised by such affidavit shall be passed upon by the Committee, whose determination with respect thereto shall be final. In the event challenges determined to be well founded shall reduce the number of available members of the Committee below that necessary for a quorum for the hearing of the matter complained of, the Court shall make additional appointments to the Committee.

The Committee is empowered and charged to conduct a hearing for the investigation of those matters raised by the complaint. The hearing shall be closed unless the licensee or person charged makes a written request prior to the commencement of the hearing that it be a public hearing. The licensee or person charged shall be entitled

to be present at the Committee hearing, to be represented by counsel thereat, to cross-examine witnesses, and submit evidence. Hearings shall be conducted in such manner as to permit the admission of relevant evidence. Upon request of the Chairman, the Court may assign a reporter to record and transcribe testimony and a clerk to administer oaths. Upon application of the Chairman, the Clerk shall cause to be issued, writs of subpoena *ad testificandum, duces tecum* or *dedimus potestatem.* Failure to obey any such subpoenas shall be deemed contempt of the Court.

On completion of the hearing the Committee shall file with the Court its findings of fact, conclusions of law and recommendations as to action to be taken by the Court in the matter, together with the entire record of its proceedings, including all papers, transcripts, minutes and exhibits, all of which shall be kept by the Clerk in the secret file. The licensee or person charged, and, upon request, the Bar Association and the Attorney General, shall be entitled to receive from the Clerk a certified copy of the findings of fact, conclusions of law and recommendations of the Committee.

If the Committee shall recommend disciplinary action be taken against the licensee or a judgment entered against the person charged, it shall submit an Order to Show Cause issuable from this Court, addressed to the licensee or person charged, directing within twenty (20) days of issuance that cause be shown, if such exists, why the findings, conclusions and recommendations of the Committee should not be adopted. Upon issuance of the Order the same shall be served upon the licensee or person charged, in the manner provided by law, and the case shall be docketed and made a matter of public record.

The Court may designate the Attorney General or one or more members of the Bar of this Court to present the case on behalf of the complainant. Upon an answer being filed to the Order to Show Cause, the Court shall fix a time for hearing and the matter shall be heard *de novo*. On failure of the licensee or person charged to answer as required in the Order, default shall be entered and proof, should the Court so order, may be made *ex parte*. Such judgment may be entered as the Court shall deem proper.

Nothing herein contained shall be construed to require this Court to follow the recommendations of the Committee and irrespective of such recommendations this Court may, in its discretion, proceed or refrain from proceeding in any cause falling within the purview of the Rule.

2. The presently existing jurisdiction and power of this Court and the other Courts of the Territory of Hawaii to grant appropriate relief in causes involving improper or unprofessional conduct by attorneys or unauthorized practice of law by other persons, shall not be deemed to be limited, restricted or abrogated by anything contained in Section 1 of this Rule.

3. This Rule shall become effective forthwith and shall govern all proceedings brought on or after this date, and all pending proceedings except to the extent that in the opinion of the Supreme Court the application of the Rule to a pending proceeding would not be feasible or would work injustice in which event the former procedure shall apply. April 21, 1954.

APPENDIX E.

Rule 15 (d), Rules of the Supreme Court of the Territory of Hawaii (Effective October 3, 1955).

RULE 15. ADMISSION TO THE BAR.

. . . (d) Reinstatement of Disbarred or Suspended Attorneys. No attorney who has been disbarred or suspended shall be eligible for reinstatement except upon a clear showing that he has complied in good faith with the order of disbarment or suspension, and that he is entirely worthy of the court's trust and confidence. An attorney who has been disbarred, or suspended for a period of six months or more, upon certification by the court of his eligibility, shall be required to pass an examination as though applying for admission to the bar.

APPENDIX F.

Pertinent Portions of Rule 1, Rules of Civil Procedure for the United States District Court for the District of Hawaii (as Amended and Effective March 21, 1955).

RULE 1. ATTORNEYS.

(a) Roll of Attorneys.

The bar of this court consists of those heretofore and those hereafter admitted to practice before this court, who have taken the oath prescribed by the rules in force when they were admitted or that prescribed by this rule, and have signed the roll of attorneys of this district.

(b) Eligibility.

Any person who is a member in good standing of the bar of (1) the highest court of this Territory or of (2) the highest court of a state is eligible for admission to the bar of this court.

* * * * * * * * * * * *

(d) Disbarment and Discipline.

Any member of the bar of this court may for good cause shown and after an opportunity has been given him to be heard, be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper.

Whenever it is made to appear to the court that any member of its bar has been disbarred or suspended from practice or convicted of a felony in any other court he shall be suspended forthwith from practice before this court and, unless upon notice mailed to him at his last known place of residence he shows good cause to the contrary within 20 days, there shall be entered an order of

disbarment, or of suspension for such time as the court shall fix.

Any person who before his admission to the bar of this court or during his disbarment or suspension, exercises in this district in any action or proceeding pending in this court any of the privileges of a member of the bar or who pretends to be entitled so to do, is guilty of contempt of court and subjects himself to appropriate punishment therefor.

(e) Disciplinary Proceedings.

(1) The court will appoint by an order entered in its minutes a "Standing Committee on Discipline," consisting of five members of the bar, and will designate one of the members to serve as chairman. The members shall continue in office for a period of two years or until further order of the court.

(2) It shall be the duty of the committee to investigate any charge or information, referred by one of the judges or otherwise coming to the attention of the committee, that any member of the bar may have been guilty of unprofessional conduct or of any conduct unbecoming a member of the bar of this court; and in cases where a majority of the members shall deem advisable, the committee shall institute and prosecute an appropriate disciplinary proceeding.

(3) Every proceeding hereunder shall be commenced by filing with the clerk an appropriate petition on behalf of the committee addressed to the judges of the court. Upon the filing of the petition, the proceeding shall be assigned to one of the judges in the same manner as any other civil action or proceeding pursuant to directions given to the clerk by the court.

(4) The judge to whom the proceeding is assigned shall forthwith issue an order to show cause, addressed to the respondent member of the bar, requiring him to appear and show cause within not less than ten nor more than twenty days from the date of the order, why he should not be disbarred, suspended, or otherwise disciplined as prayed for in the petition. The order shall further require that a copy thereof, together with a copy of the petition, be served on the respondent in a manner permitted by Rule 5 (b) of the Federal Rules of Civil Procedure, not less than ten days in advance of the date therein specified for showing cause.

(5) The judge to whom any proceeding hereunder is assigned may invite the other judge of the court to sit with him and participate in the proceeding.

(6) In all proceedings hereunder, written findings of fact and an order based thereon shall be filed.

(7) Except as otherwise provided in this rule, all proceedings hereunder shall be governed by the Federal Rules of Civil Procedure.

(8) Disciplinary proceedings under this rule shall not affect or be affected by any proceeding for contempt under Title 18 of the United States Code or under Rule 42 of the Federal Rules of Criminal Procedure.

APPENDIX G.

Summary of Testimony Concerning Honokaa Speech.

Matsuoka (newspaper reporter, "Hilo Tribune Herald"):

". . . She said she wanted to tell the people about some of the shocking, horrible things that went on, and that the Smith Act trial could not be a fair one, and that they just had to go around and make rules to fit the situation. That was, I think, the general trend." [R. 151.]

On cross-examination he gave this testimony:

"Q. It [petitioner's speech] was a general criticism as to the character of the criminal proceedings brought under the Smith Act, isn't that a fair statement? A. Yes, a portion of that speech, I think." [R. 161.]

Ferreira (worker at Honokaa Sugar Company):

"She started off telling us about the Smith Act trial; that there was no fair trial in the Smith Act case; that the government—I mean, they made up their rules as they went along in Smith Act trial, and she compared the Majors-Palakiko case with the Smith Act trial, and she also stated that in the Smith Act trial they tried you on a conspiracy, and 'conspiracy' was explained to us, not the exact wording, but was something that they tried you for, for your thoughts; in other words, something that some people think, or you might think of, or this person might think of doing some day, but never actually did, but that is how she explained it on this conspiracy. * * * Q. Did she mention any particular locality when she was talking about the Smith Act trial? A. If I remember right it was in Honolulu, but I am not too sure about that; I think it was down here." [R. 163-164.]

John D. Morse (Industrial Relations Director, Honokaa Sugar Company):

"Yes, I recall a few things. I did hear her say that there is no such thing as a fair trial in a Smith Act case, and she said that. Well, she talked quite a bit about Jack Hall, Mr. Hall was there; about the trial that was going on at that time. Q. Did she in anywise talk about the rules of evidence in the Smith Act trial? A. Yes. I don't remember word for word, naturally, but she did say that in a Smith Act case that the government permitted evidence that was primarily in their favor—in favor of the government. [R. 165.] * * * Q. Mr. Morse, do you remember Mrs. Bouslog making any statement as to whether there was such a thing or not as a fair trial in the Smith Act case? A. I remember her saying there was not such a thing as a fair trial in a Smith Act case. [R. 167.] Q. And do you remember whether she referred to the conduct and manner in which it was being handled? A. Well, it tied in, I figured it, tied in with any Smith Act case, whether in Honolulu, New York, or whatever it was; that is the impression I got from what she said." [R. 167.]

Olival (Women's Editor, "Hilo Tribune Herald"):

". . . She said that the trial was against Jack Hall, and six others were just brought in, and that its purpose was to get at the ILWU; she said that Jack Hall was being tried on something that he read many years ago, and she said that in the Smith Act trial there were no rules, and that they were making up the rules as they went along, and she said that the F.B.I. could be called Federal cops, and that when the government—they were stressing this case, and when the government—that witnesses were afraid to

testify, and they testified usually what the government wanted them to testify. * * * Q. Mrs. Olival, did Mrs. Bouslog use a phrase indicating that there were rather shocking and horrible things that were going on at the trial? A. Yes, she used those." [R. 171-172.]

Ramos (clerk, Honokaa Sugar Company):

"I said she said there was no fair trial in the Smith Act case. * * * It has been so long that most of it I have forgotten." [R. 179.]

Andrade (worker, Honokaa Sugar Company):

". . . she said she would like to tell the audience of the horrible and shocking things that went on at the Smith Act trial in Honolulu, and she also gave several illustrations, but, I am sorry, I cannot remember them, and she also said that the Federal government had created the evidence as they went along, and she referred to the F.B.I. men as Federal cops, at which time she received hearty applause from the audience. There were approximately 250 people present. Most of them were union members, . . ." [R. 180-181.]

Crabb (office manager of Paauhau Sugar Plantation Company):

"Q. Will you tell the Committee what Mrs. Bouslog said? A. Well, that the defendant in the Smith Act trial cannot get a fair trial. Q. What Smith Act trial was she talking about? A. The one in Honolulu. Q. Did she say anything else? A. And in regard to the communism books, she said those who read those books might be prosecuted." [R. 183.]

Phyllis P. Morse (wife of John D. Morse):

". . . she said that there was no such thing as a fair trial under the present Smith Act case in Honolulu, and that the newspapers were not giving a full account, a true account, and that from time to time they and we would be coming to the various islands to acquaint a group with the true facts. . . . that the government could submit any evidence they liked at any time, and that they could also use books that might not have any bearing on the case. . . . she gave various examples of things . . . that were going on, in what she called the horrifying, shocking trial." [R. 184-185.]

Hall (Regional Director for International Longshoremen's & Warehousemen's Union, defendant in Fujimoto case):

testified that he, not petitioner, made the "horrible and shocking things" remark. [R. 395.] He said that petitioner did not say the judge was making up the rules of evidence as he went along. [R. 397.] Petitioner said there were different rules of evidence in a Smith Act trial "as compared to the normal criminal trial." She criticized "the rules, not the rulings." [R. 397.]

Petitioner:

Concerning the "horrible and shocking things" remark, petitioner testified in the proceeding below, "Two days afterward I stated to Judge Wiig that I had no recollection of ever making any statement of any kind of that character or having said those words". [R. 435.] She also testified that she had said "There is no such thing as a fair trial in the Smith Act case." [R. 443.] She said she "was talking about the Smith Act and the Smith Act in

general. . . . that there was no such thing as a fair trial in any Smith Act case." [R. 444-445.] She supplied her authorities for the view that under conditions existing at the time of the Honokaa speech, a Smith Act trial for Communists could not be fair. [R. 445-448.] Her purpose was to provide her audience with sufficient information to persuade them to the conclusion that the Smith Act "was a bad law which should be repealed." [R. 448.]

She denied saying "All rules of evidence have to be scrapped or the government can't make a case," and stated that her references to rules of evidence dealt with the explanation of the difference between those rules in a conspiracy case and in an ordinary criminal case, pointing out that the government took advantage of "a latitude under the rules of evidence in conspiracy." [R. 443-444.]

Concerning the alleged remark that unless the Smith Act trial were stopped a new crime would be created, petitioner said that her remarks in substance were these:

"I said that the Smith Act—continued prosecutions under the Smith Act can lead to a new crime of reading and thought control. . . . And I said that I felt that the Smith Act would be repealed as soon as people understood what the Smith Act was." [R. 459.]

APPENDIX H.

Reference in Current Literature to Responsibilities of Lawyers to Provide Leadership in Public Discussion.

"The Traditional function of lawyers is that of servant to the whole people, guarding justice and expanding the areas of individual freedom. The judgment of history on the lawyers of our generation will be based on how adequately we have fulfilled this noble calling." William T. Gossett, General Counsel to Ford Motor Co., *Address to Michigan Judges Ass'n*, Release of Ford News Bureau, Sept. 5, 1952. "No one suggests that the American people should follow implicitly or blindly the leadership of their lawyers; but in the discussion of changes in the American form of government and in the purposes of American institutions and laws, the lawyers should do their part in the informed discussion of the great issues before the people." Judge William L. Ransom, former president of the American Bar Association, quoted by Hon. Nathaniel Goldstein, Attorney-General of the State of New York, 16 Albany L. Rev. 9 (1952). "The lawyer must not only understand the ways of democracy; he must live the ways of democracy; he must teach others and lead a nation in the ways of democracy." Hon. Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska, 23 Neb. L. Rev. 75 (1944). "Our constitutional rights of free speech and of freedom of assembly make this opportunity for advocacy available to all. Advocacy is peculiarly available to the lawyer because of his special skills." Mr. Justice William O. Douglas, *The Lawyer and the Public Service*, 26 A. B. A. J. 633, 636 (1940). "There is no reason in the world people should not criticize the [Supreme] Court. I believe

in criticizing the Court, Congress, even the Governor . . . I do not think there is any group in America outside the lawyers who can be expected to preserve the individual liberties about which people speak." Mr. Justice Hugo L. Black, *The Lawyer and Individual Freedom,* 21 Tenn. L. Rev. 461, 463, 469 (1950). See also, Myron C. Taylor, Letter to the Board of Trustees of Cornell University, 14 Cornell L. Q. 197, 198 (1929), quoted in Cheatham, *Cases and Materials on the Legal Profession* (1938), p. 398; Cooley, *Constitutional Limitations* (8th ed., 1927), vol. 1, p. 703, n. 3; Hon. Stanley H. Fuld, Associate Judge New York Court of Appeals, *The Lawyer—More Than Advocate,* 15 Albany L. Rev. 1 (1951); Justice William O. Douglas, *"Law in* Eruption,"*A Concept of Lawyer's Duty in a Time of Change,* 34 A. B. A. J. 674 (1948).

APPENDIX I.

Further Citation of Authorities Dealing With Conduct Which in the Usual Course of Judicial Decision Has Been Held to Constitute Failure to Maintain the Respect Owing the Courts.

(See footnotes 21, 22 and 23, pp. 26 and 27 of Petition.)

Footnote 21:

Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646, the attorney accosted the judge in a "rude and insulting manner" and threatened him with personal chastisement; *Elliott v. Green,* 7 Colo. 237, 3 P. 65, the attorney halted the judge on the street, addressed him in "abusive, insulting and threatening language" concerning his action in a pending matter and threatened to expose him in the newspapers; *In re Collins,* 147 Cal. 8, 81 P. 220, attorney made statement to press while matter pending before judge accusing latter of malfeasance and incompetence in office; *Chicago Bar Assn. v. Metzgen,* 291 Ill. 55, 125 N. E. 734, attorney wrote judge after latter set aside divorce decree threatening to sue judge, describing his action as "dastardly" and calling judge "irresponsible political mannikin"; *Johnson v. State,* 152 Ala. 93, 44 So. 671, attorney wrote judge that he should treat attorney as gentleman or attorney would know why and accusing judge of meeting with prosecutor to plan how and why a certain accused would be tried.

Footnote 22:

In re Hilton, 48 Utah 172, 158 P. 691, attorney in speech said that in its decision the court had been dominated by fear of the Mormon Church and had committed judicial murder; *State Board v. Hart,* 104 Minn. 88, 116

N. W. 212, the attorney wrote a letter to the Chief Justice of the Supreme Court and released a copy to the press, commenting upon a recent decision of the court, saying that it had assigned the property involved to one who had no better right to it than a burglar, that this was like robbing a widow, that the court had acted as a "fence", that the court either had emasculated intelligence or constipation of morals or faithlessness to duty, that the court was either unlearned in the law or not honest; *In re Humphrey,* 174 Cal. 290, 163 P. 60, attorney issued an election pamphlet attacking a judge for the handling of two cases in which he said, *inter alia,* that the judge had used his powers to enable a bank to keep money that another was entitled to; *State v. Breckenridge,* 126 Okla. 86, 258 P. 744, the attorney wrote a newspaper article referring to recent action of the Supreme Court of Oklahoma in which he stated erroneously that the Supreme Court had suspended the writ of habeas corpus, had an interest in the outcome of the case, and acted like a star chamber; *Wilhelm's Case,* 269 Pa. 416, 112 Atl. 561, during the pendency of a disbarment proceeding against another lawyer, the attorney made an "impassioned" speech saying that the disbarment proceeding was a conspiracy to crucify that lawyer and urging political action to prevent it; *In re Breen,* 30 Nev. 164, 93 P. 997, commenting upon a decision of the Supreme Court of the state reversing a murder conviction, the trial judge said that the opinion of the Supreme Court was an abnormal document, that it was either reprehensible or pitiable, and that it was not supported in fact or in law; *Duke v. Committee on Grievances* (C. A., D. C.), 82 F. 2d 890, the attorney filed with the appellate court a motion charging that the trial court had filed a false bill of exceptions,

that this had been done "intentionally and deliberately", and after the appellate court had refused to correct the bill of exceptions and after disciplinary proceedings had been started against him, the attorney said that the appellate court was as badly involved in falsifying the bill of exceptions as the trial judge, adding that the matter involved questions of the judicial integrity and common honesty of six federal judges; *In re Chapak* (D. C., N. Y.), 66 F. Supp. 265, during the pendency of the case the attorney wrote the judge accusing him of acting "despotically" and of deliberately taking advantage of his office to rule with "passion and vehemence". He also wrote his client saying that the judge was prejudiced against the client because the latter was a Negro; *In re Graves,* 64 Cal. App. 176, 221 P. 411, the attorney issued a public circular accusing the judge of using the "slightest flaw" to set aside a judgment against a railroad and of misusing his office so as to pry into the secrets of the juries' deliberations; *Morrison v. Snow,* 26 Utah 247, 72 P. 924, and *In re Snow, 27* Utah 265, 75 P. 741, these are related cases. In the former the attorney filed an answer to a complaint in a civil case alleging that the judge conspired with the plaintiff to bring the suit and used the weight of his judicial position to that end, and that the suit had been brought to satisfy the malicious instincts of the judge so that the fruits of it should be divided between the judge and the plaintiff. In the second case he was suspended after a hearing for having filed such a pleading; *In re Dunn,* 85 Neb. 606, 124 N. W. 120, in a petition for rehearing the attorney attacked the judge who wrote the Supreme Court's opinion, accusing him of "rank incompetence", of not knowing the plaintiff's complaint, of using reasoning that "reduces the law to a farce", of

misstating the evidence, of ignoring the evidence supporting the defendant's position, and of dispensing with the evidence so as to base his conclusions on mere conjecture; *State v. Kirby*, 36 S. D. 188, 154 N. W. 284, the attorney issued a statement to the press saying that the Supreme Court would not disbar another lawyer whose disciplinary case was then pending, because that lawyer planned to run for public office and the Supreme Court and the Governor of the state did not want that lawyer to use a decision of the Supreme Court in a third case for political purposes in a forthcoming campaign.

Footnote 23:

State Bar Commission v. Sullivan, 35 Okla. 745, 131 P. 703, the attorney caused to be printed and published a pamphlet entitled "A Criminal Combine," in which he accused a judge of participating in a criminal combination to deprive the attorney of his rights; *In re Troy*, 43 R. I. 279, 111 Atl. 723, the attorney made a speech during a Democractic campaign rally in which he asserted that judgeships on the Supreme Court of the state are "a matter of barter" and "are bought and sold" and asking "who paid money, how much was paid and who got the money at the election of the last Supreme Court judge"; *State Board v. Spriggs*, 61 Wyo. 70, 155 P. 2d 285, in an election pamphlet an attorney spoke of the "horrible and unbelievable breakdown of justice in the Supreme Court", conduct on the part of judges that "drives justice from its own temple to the habitations of bias, prejudice, failure and incompetency" and charged the judges with incompetency and corruption; *In re Bevans*, 225 App. Div. 427, 233 N. Y. S. 439, in a complaint filed in an action the attorney included allegations that judges and others had engaged in an illegal combine to commit crimes, protect

criminals and ruin those who opposed them; *Lewis County Bar Association v. Willis*, 95 Wash. 251, 163 P. 737, the attorney issued a pamphlet entitled "The Crimes and Misdemeanors of Hon. Alonzo E. Rice." This pamphlet charged Judge Rice with grand and petit larceny, malfeasance and graft, adding that his court was a school for scandal. The pamphlet charged the judge with many specific crimes and wrongful acts; *In re Egan*, 24 S. D. 301, 123 N. W. 478, the attorney through newspaper articles repeatedly charged corruption on the part of the Supreme Court and the use of political influence with its members; *In re Thatcher*, 80 Ohio 492, 89 N. E. 39, the attorney in a series of newspaper articles charged the judge with bias against plaintiffs and in favor of corporations in personal injury cases, with collusion with the employer attorneys in labor cases, with capricious judicial action in cases decided by him and with taking unlawful salary; *Cobb v. United States* (9 Cir.), 172 Fed. 641, the attorney in a letter to the press said that the court had acted in the interest of the "gang whose sinister influence has paralyzed" the judge "for the past two years"; *United States v. Green* (C. C. Colo.), 85 Fed. 857, in an appellate brief the attorney uttered a "false, scandalous and malicious libel upon two of the presiding judges." In the brief this libel attacked their integrity although the precise language is not reported; *Thatcher v. United States* (6 Cir.), 212 Fed. 801, this case rests on the same facts as *In re Thatcher, supra; In re Richason*, 64 Ariz. 85, 166 P. 2d 583, the attorney in papers filed in a case attacked the honesty, integrity and motives of individual members of the bar and made "groundless charges . . . against the judges of the Federal courts," apparently attacking their integrity although the precise language is not given

in the report. The court found that the conduct indicated "mental instability and lack of moral values"; *Bar Association v. Philbrook*, 35 Cal. App. 460, 170 P. 440, an attorney in an affidavit filed in a pending action used the following language in referring to judges of the court: "criminal, corrupt and wicked conspiracy", "calculated brutality", "corrupt deadfall"; *In re Rogers*, 28 N. M. 375, 212 P. 1034, the attorney wrote a letter to the judge saying that if ten per cent of the reports about him were true, he was a "blockhead" and the "most corrupt man . . . ever elevated to judicial position"; *In re Robinson*, 48 Wash. 153, 92 P. 929, in petition for rehearing to Supreme Court, the attorney stated that it had been rumored how the Court would vote in the case, that the estate involved therein would go one-half to the political ring under whose influence the members of the court were appointed, that the head of this ring could control federal patronage and had already decided to appoint members to federal courts in the area, and that if was the duty of the court to hear the appeal on its merits in order to wipe out these rumors; *In re Philbrook*, 105 Cal. 471, 38 P. 884, attorney filed brief with Supreme Court of state charging that one of the justices thereof, while a practicing lawyer, had participated in the preparation of a settlement agreement disposing of many issues of the case and that this agreement, if not set aside, would cause people to know that the court was corrupt. The attorney also charged that a conspiracy existed to have that agreement approved because of the power of the justice referred to and the attorney referred to him as "corrupt," "wicked" and "*particeps criminis*"; *People v. Green*, 9 Colo. 506, 13 P. 514, the attorney alleged in pleadings that the judge had accepted a bribe for rendering an unwarranted judg-

ment and that he and the bribing attorney had induced a witness before the grand jury to commit perjury; *In re Mains,* 121 Mich. 603, 80 N. W. 714, the attorney in an affidavit charged the judge with "outrageous, persistent, continued illegal and unlawful rulings", with accepting bribes, with cooperating with attorneys in a "diabolical plot" which was "a malicious, vindictive, corrupt concoction" to place that attorney's client under arrest and get control of his witnesses; *United States v. Markewich* (D.C., N. Y.), 261 Fed. 537, attorney in public speech following decision by court on discontinuance of a street car line, said that the people have been discriminated against, the traction interest has supreme control of the court and everybody else, the decision was not honestly rendered, that recall would be too mild a remedy and the correct remedy should be the noose or impeachment; *Matter of Knight,* 264 App. Div. 106, 34 N. Y. S. 2d 810, attorney accused various judges who had sat on various issues arising out of complex estate litigation of being "incompetent", "mendacious", "grossly dishonest"; *Kentucky State Bar Assn. v. Lewis* (Ky.), 282 S. W. 2d 321, attorneys connected with taxpayers' litigation published advertisement and filed affidavit charging corrupt arrangement between presiding judge and political bosses to prevent another judge from sitting on the cases.

APPENDIX J.

Text of 28 U. S. C. 1293 and 2108.

28 U. S. C. §1293. Final decisions of Puerto Rico and Hawaii Supreme Courts.

The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs.

28 U. S. C. §2108. Proof of amount in controversy.

Where the power of any court of appeals to review a case depends upon the amount or value in controversy, such amount or value, if not otherwise satisfactorily disclosed upon the record, may be shown and ascertained by the oath of a party to the case or by other competent evidence.

APPENDIX K.

Affidavit of Appellant as to Amount in Controversy.

In the United States Court of Appeals for the Ninth Circuit.

In the Matter of Harriet Bouslog Sawyer, also known as Harriet Bouslog, an Attorney at Law, Appellant. No. 15109.

Territory of Hawaii, City and County of Honolulu—ss.

Harriet Bouslog Sawyer, being first duly sworn; on oath deposes and says:

She is the appellant in the above entitled proceeding.

The value of her right to practice law in the courts of the Territory of Hawaii greatly exceeds the sum of $5,000.00, exclusive of interests and costs.

Her annual net income since she resumed the practice of law in the Territory of Hawaii in October 1946 until the time of her suspension by the judgment of the court below on April 7, 1956 has always exceeded the sum of $5,000.00, and based upon present cases and litigation her income will continue to exceed said sum.

The value of her interest in the law partnership of Bouslog & Symonds formed in February, 1948, greatly exceeds the sum of $5,000.00.

/s/ Harriet Bouslog Sawyer
HARRIET BOUSLOG SAWYER

Subscribed and sworn to before me this 8th day of May, 1956.

[SEAL]

[S] EDWARD H. NAKAMURA
Notary Public, First Judicial Circuit,
Territory of Hawaii.

My commission expires: May 19, 1958.

Received copy of the foregoing Affidavit this 9th day of May, 1956.

(s) A. William Barlow
A. WILLIAM BARLOW

(s) Edward N. Sylva
EDWARD N. SYLVA
Attorney General, Territory of Hawaii.

aminers, 353 U.S. 232, to sit in judgment on Louisiana disbarments, and we are not in any event sitting in review of the Louisiana judgment." *Id.* at 281. The narrow limits for review involved in *Konigsberg* and *Schware* do not encompass the case at bar and no important federal law that would require the granting of the writ of certiorari is involved herein.

The courts below found no contravention of the First and Fifth Amendments. (See Appendix A of Petition for Writ of Certiorari, p. 18.) This conclusion does not, in any way, conflict with the applicable decisions of this Court as to necessitate the issuance of a writ of certiorari. Also, this conclusion does not, in any way, conflict with *Bridges v. California,* 314 U.S. 252; *Pennekamp v. Florida,* 328 U.S. 331; *Craig v. Harney,* 331 U.S. 367.

This Court in *Theard* reaffirmed the oft-stated rule adopted in the courts below—that membership in the bar is a privilege burdened with conditions. Liberty and freedom of speech under the Constitution do not mean the unrestrained right to do and say what one pleases at all times and under all circumstances. They do not license scandal and defamation of courts. One of the fundamental duties of an attorney, clearly set forth in the first canon of professional ethics of the American Bar Association adopted by the Territorial Supreme Court and early recognized by this Court, is to maintain a proper respect for courts of justice and judicial officers. *Bradley v. Fisher,* 13 Wall. 335.

An attorney, of course, does not, in assuming the obligations of his profession, surrender his right as a

citizen to criticize the decisions of the courts in a fair manner. But the right of fair criticism does not carry with it the liberty to engage in such conduct as to impugn the integrity of a judge presiding in a pending case and to create disrespect for the courts and judicial officers. This is not to say that an attorney may not criticize the decisions of a court at any time. But, as aptly put by the court below, an attorney cannot litigate on a given case by day and castigate by night (or at recess) the very court that he is appearing before. As stated in *United States v. Markewich*, 261 Fed. 537:

> ". . . . Of all men, none owes a more scrupulous allegiance to law and order than the lawyer. If he advises and encourages disrespect for the courts, and indulges in false statements concerning them, he helps undermine the very government to which he has sworn to be loyal. He thus forgets his obligations, both as a citizen and as a member of the bar. The wrong he does affects not only the courts, but the bar as well." *Id.* at 540.

Imposition of the clear and present danger test of *Bridges, Pennekamp,* and *Craig* upon the conduct of an attorney would nullify the very first and important canon of ethics by which all attorneys are bound. The rejection of the clear and present danger test by the court below can be deemed improper only if this Court is willing to emasculate the basic duty of the lawyer to the courts which this canon enunciates. But this Court has indicated in *Theard* that a lawyer is bound by reasonable rules of court and his conduct cannot be as unbridled as that of a layman's:

". . . The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals. ' "Membership in the bar is a privilege burdened with conditions" (*Matter of Rouss,* [221 N.Y. 81, 84, 116 N.E. 782, 783]). The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.' *People ex rel. Karlin v. Culkin,* 248 N.Y. 465, 470-471, 162 N.E. 487, 489. The power of disbarment is necessary for the protection of the public in order to strip a man of the implied representation by courts that a man who is allowed to hold himself out to practice before them is in 'good standing' so to do." *Theard v. United States,* 354 U.S. 278, 281.

This tribunal has also made it clear that it will unhesitatingly protect counsel in fearless, vigorous and effective performance of advocacy on behalf of all persons though identified with unpopular causes. "But it will not equate contempt with courage or insults with independence. It will also protect the processes of orderly trial, which is the supreme object of the lawyer's calling." *Sacher v. United States,* 343 U.S. 1, 13-14. It is interesting to note that the majority and dissenting opinions did not allude in *Sacher* to the freedom of speech of the attorney-appellant therein and the clear and present danger test urged herein.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958.

No. 326

In the Matter of Disciplinary Proceedings against
HARRIET BOUSLOG SAWYER,
a Member of the Territorial Bar of the Territory of Hawaii,
Petitioner.

BRIEF OF RESPONDENT.

A. WILLIAM BARLOW,
Attorney for the Bar Association of Hawaii,
410 Gasco Building, Honolulu, Hawaii,
HERBERT Y. C. CHOY,
Attorney General,
Territory of Hawaii,
MORIO OMORI,
Special Deputy Attorney General,
Territory of Hawaii,
Iolani Palace Grounds, Honolulu, Hawaii,
Attorneys for Respondent.

Fisher v. Pace, 336 U.S. 155, involved an attorney who exceeded the bounds of permissible arguments to the jury and who persisted in arguing the points held inadmissible, despite the court's admonitions. To follow the First Amendment argument of petitioner herein to its utmost logical end under such circumstances would be to lead to the conclusion that First Amendment rights were involved as to invoke the clear and present danger rule. But this Court saw "nothing in their [Texas Supreme Court's] opinion or conclusion that indicates any disregard of petitioner's rights." *Id.* at 162. It quoted with approval, the state supreme court's opinion that the trial judge's rulings are subject to review in the appellate courts, but the trial judge has the power to make such rulings, right or wrong. ". . . 'If they are erroneous the injured party has the plain, simple and adequate remedy of appeal. It was thus the duty of counsel to abide by his decisions even if erroneous; and if any rights of his clients were violated the remedy was by exception and appeal. Any other procedure would result in mockery of our trial courts and would destroy every concept of orderly process in the administration of justice.' " *Id.* at 162. The constitutional protection of free speech, therefore, was never in issue.

The foregoing decisions of this tribunal amply demonstrate that the rulings of the lower courts in the case at bar are in no way in conflict with the applicable decisions of this Court. They place in proper perspective these cases of local disciplinary actions against attorneys. They do not blow up the chastise-

ment of attorneys under applicable rules of conduct and canons of ethics into a constitutional *cause célébre.* The courts below in the instant case deviated not one iota from the rulings of this tribunal.

Petitioner further urges certiorari to determine the proper relations between the territorial court and the federal court in matters of discipline by the territorial court for conduct concerning the federal court. The point made seems to be that petitioner's misconduct involved an attack upon the administration of justice in the United States District Court of Hawaii and upon the presiding judge of said court and that petitioner's interview of a juror under the circumstances found by the courts below involved a juror in a federal case. Therefore, the territorial court improperly established standards of conduct for federal attorneys in cases before federal courts. The adjunct to this argument, carried to its logical conclusion, would be that as long as petitioner misconducts herself within the confines of federal court jurisdiction, the territorial court must stand aside and leave her alone until she misconducts herself on the territorial side of the street. To press this argument further, if petitioner misconducts herself in any jurisdiction other than Hawaii, the territorial court must again stand aside and wait for her misconduct on its side of the street.

The fallacy of this contention seems obvious. Certiorari to determine this question would only result in the affirmation of the rule enunciated over and over again by this Court that the power to disbar is inci-

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 326

In the Matter of Disciplinary Proceedings against
HARRIET BOUSLOG SAWYER,
a Member of the Territorial Bar of the Territory of Hawaii,
Petitioner.

BRIEF OF RESPONDENT.

QUESTIONS PRESENTED.

1. Whether the disciplinary proceeding in the territorial court for gross misconduct involved federal law.

2. Whether the rulings of the court below decided important questions of federal law and decided federal questions in conflict with the applicable decisions of this Court.

3. Whether the rulings of the courts below set up standards of conduct for the federal court and interfered with the relations between territorial courts and federal courts.

4. Whether the findings of the courts below necessitate certiorari under the "two-court rule" of this Court as to require the supervision of this Court.

STATEMENT OF THE CASE.

The statement of the case presented in the petition for writ of certiorari (pp. 6-13) inserts matters of opinion and argument and presents a summary of the evidence based primarily on petitioner's view of such evidence. Respondent will discuss the evidence based upon specific pages of the record in the argument portion of this brief.

SUMMARY OF ARGUMENT.

The petition for a writ of certiorari should be denied in that no important unsettled question of federal law is involved and no federal question has been decided in a way in conflict with the applicable decisions of this Court. The proceeding in question involves a local question of the violation of the canons of ethics applicable in the territorial jurisdiction. The local court has the inherent and statutory power to discipline a member of its bar and this Court does not sit in judgment on the exercise of such power. First Amendment rights are not involved and the clear and

present danger rule has no application. There was no declaration by the local court of the law and standard of conduct for the federal court. The local court, as the primary licensing jurisdiction, has the inherent power to discipline for misconduct unworthy of an attorney committed in the local, federal, and any other jurisdiction.

ARGUMENT.

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED IN THAT NO IMPORTANT UNSETTLED QUESTION OF FEDERAL LAW IS INVOLVED AND NO FEDERAL QUESTION HAS BEEN DECIDED IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

The position of respondent Bar Association of Hawaii has consistently been that the case at bar is a disciplinary proceeding of a local, territorial nature with no federal implications. This proceeding merely involves a local question of the violation of the canons of ethics by one licensed to practice in the territorial courts.

That the power to disbar an attorney is incidental to the local court for the maintenance of the respectability of the bar and preservation of its harmony with the bench was early decided by Chief Justice Marshall, speaking for this Court, in *Ex parte Burr,* 9 Wheat. 529. It is also well-settled that by the rules and practices of common-law courts, "it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and coun-

sellor, and for what cause he ought to be removed," subject, of course, to sound judicial discretion to maintain and guard the independence of the bar and the dignity of the court. *Ex parte Secombe,* 19 How. 9. A disciplinary proceeding by a local court "is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them." *Ex parte Wall,* 107 U.S. 265, 288.

The rights and duties of an attorney are manifold. The pertinent duty involved in the case at bar is simple. As stated by this Court in *Bradley v. Fisher,* 13 Wall. 335, 355:

> ". . . the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts."

The Circuit Court of Appeals affirmed the finding of the territorial court that petitioner, by her conduct, impugned the integrity of the judge presiding in a pending case in which petitioner was one of the defense attorneys, and thus tended to create disrespect for the courts of justice and judicial officers, contrary to her obligations and duties assumed as an attorney

licensed to practice in the territorial courts. As shall be demonstrated in Point II, *infra*, the finding affirmed by the court below was in strict conformity with the rule enunciated in *Bradley v. Fisher, supra.*

This Court more recently recognized the important status of the local court in determining the fitness of an attorney to remain a member of such local court in *Selling v. Radford*, 243 U.S. 46. In that case, this Court chose to permit the respondent to file the records of the state court (the Michigan Supreme Court which disbarred him from practice in Michigan for professional misconduct) to point out any ground, within the limitations set, which would prevent this Court from giving effect to the conclusions of the state court to disbar respondent from the Bar of this Court. This Court viewed the conclusions of the state court to be controlling as far as the respondent's disbarment from practice in the state court was concerned. It recognized the absence of fair private and professional character inherently arising as the result of the action of the state court, subject only to certain limitations, as far as respondent's disbarment from practice in this Court was concerned. See also *In re Isserman*, 345 U.S. 286, 348 U.S. 1.

Most recently in *Theard v. United States*, 354 U.S. 278, decided on June 17, 1957, this Court recognized the sanctity of local state disbarment proceedings. As stated in *Theard*, "It is not for this Court, except within the narrow limits for review open to this Court, as recently canvassed in *Konigsberg v. California*, 353 U.S. 252, and *Schware v. Board of Bar Ex-*

dental to the local court and that the ruling consideration is the preservation of the respectability of the bar and maintenance of justice, unsullied by the ministrations of persons unable or unwilling to uphold the dignity of the profession and to improve not only the law but the administration of justice. *Ex parte Burr,* 9 Wheat. 529; *Ex parte Secombe,* 19 How. 9; *Ex parte Wall,* 107 U.S. 265; *Bradley v. Fisher,* 13 Wall. 335. Misconduct, whether on the federal or territorial side of the street, is misconduct that invites and merits stern and just condemnation by either court.

Petitioner misconstrues *In re Isserman,* 9 N.J. 269, 87 A. 2d. 903. She states that the state court (New Jersey) determined the fitness of Isserman to remain a member of its bar on the basis of the federal court's determination that he had committed an offense against the federal court. Even a cursory reading of that case would clearly show that the state court, as the jurisdiction primarily responsible for Isserman's conduct at the bar, applied its own standard of conduct to the actions of Isserman before the federal court. No other conclusion can be reached from the following words of Chief Justice Vanderbilt:

> ". . . The respondent must be judged by the standards of practice prevalent here. It is unthinkable that any one of the many incidents for which the respondent was convicted of contempt in New York could have occurred in New Jersey. The mutual respect that our bench and our bar have traditionally had for each other and their high regard for the administration of justice would have precluded any such conduct by an

> attorney here. . . . In fairness to the courts of other jurisdictions and out of a decent respect for the opinion of the people of this State, we cannot permit a lawyer admitted to practice in New Jersey to do in the courtroom of another jurisdiction what he would never have been allowed to do here. To do so would bring into disrepute our bar, our bench and our entire judicial establishment." *Id.* at 907.

This determination did not declare the law for the federal court. It declared a standard of conduct for attorneys licensed to practice in New Jersey to be followed in any jurisdiction, local or federal. The determination of the courts below in the case at bar did nothing more than *Isserman.* It did not establish "standards of conduct for federal attorneys in cases before federal courts" as charged by petitioner. It established a standard of conduct for attorneys licensed by the territorial court to be followed and observed by such attorneys in any jurisdiction. There was no usurpation of the federal court's power. Indeed, the federal court is free to bring disciplinary proceedings against petitioner irrespective of the action of the territorial court.[1] See *Selling v. Radford,* 243 U.S. 46; *In re Isserman,* 345 U.S. 286, 348 U.S. 1; *Theard v. United States,* 354 U.S. 278.

The disciplinary case of *Geibel v. State Bar of California,* 11 Cal. 2d 412, 79 P.2d 1073, 1074, 1075

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[1]The United States District Court for the District of Hawaii issued an Order of Suspension dated April 7, 1956 against respondent (In the Matter of Harriet Bouslog Sawyer, also known as Harriet Bouslog, an Attorney at Law, Misc. No. 649) pursuant to Rule 1(d) of the Rules of Civil Procedure of that court.

(1938), *cert. den.* 305 U.S. 653, *reh. den.* 305 U.S. 676, clearly states the rule with numerous citations:

> "If an attorney admitted to practice in the courts of this state commits acts in reference to federal court litigation which reflect on his integrity and fitness to enjoy the rights and privileges of an attorney in the state courts, proceedings may be taken against him in the state court. People v. Green, 9 Colo. 506, 13 P. 514, 524; State v. Grover, 47 Wash. 39, 91 P. 564; In re Lamb, 105 App. Div. 462, 94 N.Y.S. 331; In re Sherwood, 259 Pa. 254, 103 A. 42, L.R.A. 1918D, 447; Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377; 61 L.Ed. 585, Ann. Cas. 1917D, 569; 5 Am. Jur. 433; 7 C.J. Sec., Attorney and Client, § 18, p. 730."

This Court recently recognized the same rule in *Theard v. United States, supra,* stating that "The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included." *Id.* at 281. This Court made it clear that it was not sitting in review of the state court judgment of disbarment of respondent therein. Recognition was accorded the state court judgment insofar as the state disbarment was concerned; the federal disbarment proceeding of the same attorney for the same alleged misconduct to determine his fitness to practice in the federal courts was deemed the responsibility of the federal judiciary. The "deference" which the petitioner herein insists on imposing upon the territorial and federal courts, each to the other, is of no moment here. Each

court, in pursuit of its autonomous control over its attorneys and its inherent authority to maintain the honor and integrity of a profession which depends upon public trust and confidence for its very existence, is permitted and, in fact, obliged to demand that all lawyers meticulously adhere to the standards of conduct that would merit such public trust and confidence. As stated by the court below, the Territory should be commended rather than chided for so doing. The federal law, recognizing this inherent right, has been enunciated by this tribunal from its earliest pronouncement by Chief Justice Marshall in *Ex parte Burr* to the most recent pronouncement by Mr. Justice Frankfurter in *Theard*. Certiorari for a further pronouncement is needless and, in this case, would show no federal law that needs to be settled and no conflict with applicable decisions of this Court.

II.

THE FINDINGS OF THE TERRITORIAL COURT WERE AFFIRMED BY THE CIRCUIT COURT OF APPEALS ON THE BASIS OF CLEAR AND CONVINCING EVIDENCE OF RECORD. THE COURTS BELOW DID NOT DEPART FROM NOR IN ANY WAY SANCTION A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWERS OF SUPERVISION ON THE GROUND OF ARBITRARINESS OFFENSIVE TO DUE PROCESS.

This Court has held that as to disbarment, due process requires only that an attorney have reasonable notice of the charges against him and a reasonable opportunity to be heard in his defense. *Ex parte*

Wall, 107 U.S. 265; *Randall v. Brigham,* 7 Wall. 523. The manner in which such notice is given and the proceeding is conducted is a matter of judicial regulation and within the sound discretion of the court. *Randall v. Brigham, supra; Phipps v. Wilson,* 186 F.2d 748 (7th Cir.); *In re Henriques,* 34 Haw. 348.

The record of the disciplinary proceedings on the territorial level indicates that every constitutional requirement of due process has been met. See *Bute v. Illinois,* 333 U.S. 640; *Herbert v. Louisiana,* 272 U.S. 312; *Holden v. Hardy,* 169 U.S. 366.

The disciplinary proceedings against petitioner were instituted in the Supreme Court of the Territory of Hawaii by the Bar Association of Hawaii, an unincorporated association. The complaint was filed on July 8, 1954, under Rule 19 of the Rules of the Supreme Court of the Territory of Hawaii then in effect.[2] (R. 3-4.)

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[2]Petitioner makes the charge that "the bar association devised an amendment to the Territorial Court's rules permitting the association to file such complaints." (Petition for Writ of Certiorari, p. 12.) Petitioner seems to take the aggrieved posture of one being conspired against and persecuted by all of the members of the Bar. There is no such evidence of record to support this ridiculous charge. And no such evidence can be shown. However, assuming arguendo that the charge is true, it is generally accepted that rules of court with regard to disciplinary proceedings against attorneys can operate retrospectively (*In re Noell,* 234 Mo. App. 1162, 96 S.W.2d 213); and that the statutory method and procedure for disciplining attorneys is not exclusive and does not fetter the courts in the exercise of their inherent power to proceed against unworthy attorneys (*State v. Spivey,* 213 N.C. 45, 195 S.E. 1; *In re Rudd,* 310 Ky. 630, 221 S.W.2d 688). It is also an elementary proposition that the ex post facto doctrine relates exclusively to criminal or penal statutes (11 Am. Jur. 1179), and it cannot be maintained that the procedural changes involved constitute a denial of due process to petitioner (*In re Craven,* 178 La. 372, 151 So. 625).

The complaint was referred on July 8, 1954 as secret file number 45 to the Committee on Legal Ethics and Unauthorized Practice of Law (hereinafter referred to as the Ethics Committee). The Bar Association was ordered on September 21, 1954, to file a bill of particulars or to amend paragraph III of its complaint, making more specific its charge involving petitioner's interview with the juror in the *Fujimoto* case. The same order required petitioner to file such special pleas to the jurisdiction of the Ethics Committee, the sufficiency of the complaint and a clarification of her request that the hearing be postponed until after the disposition of the *Fujimoto* case (R. 95, 96). The bill of particulars was filed as ordered and petitioner, through her attorney, J. Garner Anthony, advised the said Committee by letter dated October 14, 1954, that she would file no special plea to the jurisdiction nor press for a continuance and announced herself ready to proceed. (R. 105.)

The Ethics Committee proceeded to hold a hearing on November 22, 1954, to investigate the charge made in the complaint, to wit: (1) the alleged improper conduct of petitioner in making the Honokaa speech, and (2) the alleged improper conduct in interviewing a juror in the *Fujimoto* case and filing an affidavit without disclosing all of the facts and circumstances connected thereto. Said Ethics Committee was composed of six respected members of the Bar. Petitioner was represented by J. Garner Anthony. (R. 135.) Testimony of 19 witnesses and numerous exhibits were presented to the Ethics Committee on November 22, 23, and 24, and December 2, 3, 6 and 8, 1954. Said

testimony covered two volumes of 429 typewritten pages (R. 131) and covers 408 pages of the 546-page Transcript of Record. (R. 135-542.)

After these hearings, the Ethics Committee, on July 1, 1955, filed a report of the charges, facts and conclusions pursuant to Rule 19. The Ethics Committee found that petitioner, while one of the attorneys for certain defendants in the *Fujimoto* case, made a speech at a public gathering at Honokaa during the course of the trial, "at which she said among other things, that horrible and shocking things were going on at the trial; that there was no fair trial of the case; that they just made up the rules as they went along, that unless the Smith Act trial was stopped in its tracks in Honolulu there would be a new crime." (R. 15.)

The Committee further found that after the verdict in the *Fujimoto* case, petitioner visited one of the jurors, David P. Fuller, Jr., while he was in a very poor mental and physical condition and, in submitting her affidavit concerning said interview, petitioner "did not fully disclose to the court the condition of Mr. Fuller, nor the fact that she had attempted to get affidavits from Mrs. Fuller, who refused to sign one, and could not get an affidavit from Mr. Fuller because of his condition."

Upon these findings, the Ethics Committee was of the unanimous opinion that the charges of the complaint were sustained by the evidence, and that comments made at Honokaa imputing to the judge unfairness in the conduct of the *Fujimoto* trial and im-

pugning the integrity of the local federal courts, and other comments made at Honokaa violated Canons 1 and 22 of the Canons of Professional Ethics of the American Bar Association. (R. 15-16.)

The Ethics Committee was of the further unanimous opinion that "it was improper for appellant to submit her affidavit concerning the interview with the juror Fuller to the Presiding Judge under the circumstances under which it was submitted." (R. 16.)

After a study and consideration of the report of the Ethics Committee, the Supreme Court of the Territory of Hawaii, on July 8, 1955, pursuant to Rule 19, issued to petitioner an order to show cause why the findings, conclusions and recommendations of the Ethics Committee should not be adopted. (R. 131.) The cause was then removed from the secret files to the regular files of the court.

Petitioner was granted an extension of time to September 19, 1955, within which to answer the order to show cause, by order filed July 27, 1955. Further extensions of time to answer were granted petitioner at her request or upon motion. (R. 132.)

Instead of a return to the order to show cause, petitioner then filed, on October 19, 1955, a motion to dismiss the order to show cause. Various memoranda were filed and a hearing held. The motion was denied. (R. 132.)

More time for filing petitioner's return to the order to show cause was requested by petitioner and granted to December 2, 1955, and argument set for January 9, 1956. (R. 109.)

On November 7, 1955, petitioner filed a motion for reconsideration of the order denying the motion to dismiss the order to show cause. The motion was also extensively argued and denied by order filed November 29, 1955. (R. 132.)

A return to the order to show cause was finally filed by petitioner on December 2, 1955. (R. 133.) Another motion for continuance by petitioner followed and another hearing was held. (R. 133.)

On the date set for trial, January 9, 1956, a pre-trial conference was held with all counsel present. Two days later, another delay was occasioned by a suggestion of disqualification of Associate Justices Stainback and Rice of the territorial Supreme Court. (R. 133.) Extensive argument again followed. The territorial court held that neither justice was disqualified. (R. 71-90.) However, Mr. Justice Stainback withdrew *sua sponte* from the hearings. (R. 133.)

It was determined at the pre-trial conference that, under Rule 19 of the Rules of the Supreme Court of the Territory of Hawaii, petitioner was entitled to a *de novo* hearing before the Supreme Court. Petitioner, however, through her counsel, suggested and respondent consented to a submission to the court upon the entire transcript of the record and exhibits developed and submitted to the Ethics Committee. (R. 113.) Briefs were duly filed and an extensive oral argument held March 1, 1956.

By opinion filed April 6, 1956, (R. 93-126), the territorial court found *inter alia* that the allegations

in the complaint were "sustained by convincing proof, by credible evidence of more than a mere preponderance"; that petitioner, while an attorney of record in the *Fujimoto* case and during the course of the trial, did say in her public speech in Honokaa, Hawaii, "that horrible and shocking things were going on at said trial, that a fair trial was impossible, that all of the rules of evidence were being scrapped so that the government could make its case; that the rules of evidence and procedure were made up as the case proceeded, and that unless the trial was stopped in its tracks certain new crimes would be created" (R. 116-117); that petitioner exhibited an evasiveness and lack of frankness as to her conduct and equivocated when faced with the testimony of witnesses, yet admitted authorship of language in a pamphlet entitled "Fear" (Exhibit 6) which revealed great similarity with the language attributed to her in her Honokaa speech (R. 115-116); and that shortly after the verdict in the *Fujimoto* case, petitioner visited a juror in that case and studiedly interrogated him, despite said juror's mental and physical condition of which she was aware. (R. 117.) The court found from the testimony and evidence before it that petitioner engaged and participated in a willful oral attack upon the administration of justice in and by the United States District Court for the District of Hawaii in the *Fujimoto* case and by direct statement and implication impugned the integrity of the judge presiding in the then pending *Fujimoto* case, and thus tended to also create disrespect for the courts of justice and judicial officers generally. (R. 117-118.)

Upon the finding of gross misconduct with respect to the Honokaa speech, the territorial court suspended and prohibited petitioner from the practice of law for a period of one year and to pay all costs and expenses of the proceedings. (R. 118.)

The territorial court also found that petitioner's repeated and studied interrogation of the juror Fuller amounted to gross misconduct but let its disciplinary order of one year suspension and payment of costs suffice.[3] (R. 121.)

A notice of appeal to the United States Court of Appeals for the Ninth Circuit was filed by petitioner on April 13, 1956. (R. 128.)

On the same date and upon her request, petitioner was permitted to maintain the status quo of her business affairs pending appeal to the court below for a stay of suspension. (R. 134.) Said order was extended by the territorial court at petitioner's request on April 26, 1956. (R. 134.)

Petitioner filed a motion in the court below for a stay pending appeal of the order of suspension, or for a writ in aid of that court's jurisdiction dated April

[3]The court specifically found that petitioner's repeated interviews with and interrogations of juror Fuller constituted gross misconduct. (R. 121). Inasmuch as a one-year suspension and charge of costs had already been adjudged on the Honokaa speech charge, the court let that disciplinary order suffice. It is the contention of respondent that the decision to let such disciplinary order stand without further punishment on the juror charge was predicated upon the continued validity and effectiveness of the said punishment on the Honokaa speech charge. The court below found the penalty for the two charges as being imposed concurrently. Be that as it may, both charges were found by both courts to be sustained by the evidence.

23, 1956. Said motion was granted on May 23, 1956. Thence followed three hearings on a motion to dismiss and upon the merits and a final decision of the court below filed on June 9, 1958.

Petitioner urges that the finding of the court below is so dogmatic an inference as to be wholly unwarranted and so arbitrary as to be offensive to due process. (Petition for Writ of Certiorari, p. 21.) Due process is deemed to be violated because, in the view of petitioner, the court below misstated the evidence or by truncation gave it a different meaning and rested the findings upon isolated selections of the evidence. (Petition for Writ of Certiorari, p. 22.) Put more bluntly without fancy verbiage, petitioner is merely saying that the courts below refused to take her present view of the evidence. In the words of the majority of the court below, "Respondent overly dissects the evidence and puts too innocent a gloss on it." (Petition for Writ of Certiorari, App. A, p. 16.)

This Court does not grant certiorari "to review evidence and discuss specific facts." See *United States v. Johnston*, 268 U.S. 220, 227. As stated in *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."

Thus, where conclusions of the courts below depend upon appreciation of circumstances which admit of

different interpretations, this Court should not interfere. *NLRB v. Pittsburgh Steamship Co., supra; Federal Trade Comm'n v. American Tobacco Co.*, 274 U.S. 543. And "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275. No such showing can be made herein.

Petitioner presents a statement of the case (Petition for Writ of Certiorari, p. 6, *et seq.*) which summarizes the evidence in the best possible light for her. Petitioner's analysis of the evidence shreds parts of the record into little threads and interweaves the Honokaa speech into a professorial dissertation on Smith Act prosecutions. The courts below viewed the evidence differently. There is clear and convincing evidence, free from doubt, to support their view of the evidence.

Chronologically stated, the record shows the following: Petitioner made a speech at a public gathering, held under the auspices of the defense committee, consisting largely of members of the International Longshoremen's and Warehousemen's Union at Honokaa, Hawaii, while serving as counsel for certain respondents, including Jack Hall, in the *Fujimoto* case then at trial before the Honorable Jon Wiig, United States District Court Judge for the District of Hawaii. (R. 410.) Jack Hall, one of the defendants in the *Fujimoto* trial is the Regional Director of the ILWU.

In her attempted contradiction of this evidence, petitioner insists that in charging that there is no such thing as a fair trial in the Smith Act case, she was referring to Smith Act cases in general. This contention has no basis in fact. It is firmly established by the foregoing evidence that her charge was directed toward the *Fujimoto* trial. Even assuming arguendo that said charge was meant to refer to Smith Act cases in general, she illustrated and explained her charge with attacks on what was going on at the *Fujimoto* trial. The *Fujimoto* trial being a Smith Act case, the syllogism is manifestly complete. Her contention that she was talking in generalities seems quite lame in the face of her attacks on the type of testimony being admitted in evidence in the *Fujimoto* trial. In illustrating the unfairness of Smith Act cases with specific attacks on Judge Wiig's actions in the *Fujimoto* case, her purported generalities patently ceased to remain generalities.

Petitioner attempts to explain that her charge that all of the rules of evidence were being scrapped so that the government could make its case and that the rules of evidence and procedure were made up as the case proceeded were not directed at Judge Wiig or the court. She points out that Judge Wiig was never mentioned by her. She emphasizes that the pronoun "they" (meaning the government) was used. She contends that her remarks were directed towards the conduct of th prosecuting attorneys. (Petition for Writ of Certiorari, pp. 22-24.)

There is one primary and patent fallacy in these contentions. It is horn-book law that needs no citation of authority that rules of evidence and procedure in any trial are not made by the prosecuting attorneys. That is within the sole and exclusive province of the judge. It is the judge who rules upon the competency, relevancy, and materiality of any evidence offered by the prosecution or the defense. It is the judge who rules upon the proper procedure at the trial. If there be any scrapping of the evidence to permit the prosecution to make a case, if there be any rules of evidence and procedure "made up" as the case proceeds, it is the unjudicial handiwork of the judge and no one else. It follows that the charge that "all rules of evidence were being scrapped so the government could make its case" and that "the rules of evidence and procedure were made up as the case proceeded" was an unvarnished attack which "by direct statement and implication impugned the integrity of the presiding judge" and was an attack upon the administration of justice in and by the said court. The courts below so concluded, and properly so. The conclusion also follows that such attacks, not by a layman, but by an officer of the court favored with the mantle of respectability and authority of a license to practice law, most assuredly tended to create disrespect toward the courts and judicial officers. The courts below so concluded, and properly so.

Only a few words need be said about the finding that petitioner charged that "unless the trial was

stopped in its tracks certain new crimes would be created." Petitioner does not attack the finding that petitioner made such a statement; she only attacks the conclusion that she attacked the administration of justice and impugned the integrity of Judge Wiig. (Petition for Writ of Certiorari, pp. 24-25.) Petitioner again attempts to isolate this charge from the fabric and framework of her speech. Since petitioner does not attack this finding, it is presumed that the record discloses that said finding has a reasonable basis in the evidence. From the admitted valid finding of the court on this matter, it rationally follows that where the conduct of the trial by the judge is characterized as encouraging new crimes (however identified or unidentified) unless stopped in its tracks, the administration of justice and integrity of the judge are questioned. There is indeed a rational connection between the fact admitted as proved and the ultimate fact presumed on this point. Such a charge would certainly also tend to create disrespect for the courts of justice and judicial officers generally. The courts below so found, and properly so.

It is respectfully submitted that the concurrent findings of the two courts below are supported by clear and convincing evidence. The "two-court rule" above referred to is eminently applicable herein. There is no need for the exercise of this Court's power of supervision as to necessitate the granting of certiorari.

CONCLUSION.

Upon all of the foregoing, respondent Bar Association of Hawaii prays that the petition for writ of certiorari be denied.

Dated, Honolulu, Hawaii,
October 3, 1958.

Respectfully submitted,

A. WILLIAM BARLOW,
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(Appendix I Follows.)

Appendix I

EXHIBIT 1—MATSUOKA'S "NOTES"

Notes on Mrs. Harriet Bouslog Sawyer's speech at People's theater, Honokaa, Sunday, December 14.

She followed Samuel M. Bento, who said he wanted to say good morning to the Tribune-Herald, pointing generally toward the paper's reporter from Hilo and the paper's Honokaa correspondent who were sitting side by side. Mrs. Sawyer preceded Jack W. Hall.

She began speaking at 11 a.m. and ended 11:30 a.m.

Notes on what she said in the order of how she proceeded: The trial is really a trial of Jack Hall to which has been added six others. It's to get at the ILWU.

Said she wanted to tell about some rather shocking and horrible things that go on at the trial.

She was appointed some years ago (3 or 4 years ago) by a court to defend a man who had no money to hire his own counsel. He was charged with pimping and procuring. The complaining witness in the case was a woman who had been in business 20 years in the territory who claimed she had reformed and repented but this vicious man had driven her back again into the business. It turned out that the hotel where he had kept her had 27 doors unlocked. Likened this to pukas in the Smith act.

(R. 385.) The defense committee was established to undertake and finance the defense of Jack Hall and any other union member defendant under the Smith Act. (R. 401-402.) It was handling the financial contributions to this end. (R. 402.) The meeting at Honokaa, however, was not held for the purpose of securing further contributions, because the contribution program of the defense committee had been set up and approved long prior to the time of the Honokaa meeting. (R. 410.) The meeting at Honokaa was for the purpose of reporting back about the Smith Act trial to those who contributed to Jack Hall's trial. (R. 410.)

Jack Hall, one of the defendants in the Smith Act trial then going on in Honolulu and one of the respondents who was being defended by petitioner, was on the speakers' rostrum with petitioner and also gave a speech following petitioner's speech. (App. I, p. i.)

This is the framework within which the questions involving the Honokaa speech must be viewed. The audience was composed of a majority of union members who had contributed to the defense of petitioner's client, Jack Hall. They were conceivably there to hear about how their money was being spent. It is reasonable to assume that these laymen were more interested in the details of the immediate trial rather than in a lawyer's general critique on the provisions of the Smith Act. The stage was thus set for Jack Hall's lawyer's speech.

Petitioner insists she spoke of Smith Act trials in general. (Petition for Writ of Certiorari, p. 23.) The

evidence is otherwise. Virtually all of the testimony in the case undeniably points to the fact that petitioner was referring to the trial then going on in Honolulu. The evidence indicates that petitioner commenced her speech by pointing out that "the trial is really a trial of Jack Hall" to which six others had been added, the purpose being to get at the ILWU. (App. I, p. i.) No reasonable mind would deny that this statement referred to the *Fujimoto* trial.

The news reporter Matsuoka positively testified that petitioner was talking about "[t]he Smith Act trial, that was under way in Honolulu." (R. 150.)

The testimony of Mrs. Thelma Olival, another witness, corroborates this in positive terms:

> "Q. Now what trial was she referring to?
>
> A. To the Jack Hall trial.
>
> Q. Do you know where that trial was being held?
>
> A. In Honolulu here.
>
> Q. There is no doubt in your mind that she was referring to that trial?
>
> A. Oh, yes, she was referring to it." (R. 172.)

Ethel Chong Andrade, a plantation worker, testified that petitioner gave "a very excellent speech", "a very interesting", "very stimulating" talk and that Mrs. Bouslog "said she would like to tell the audience of the horrible and shocking things that went on at the Smith Act trial in Honolulu" and "she also gave several illustrations". (R. 180-181.)

David K. Crabb, another witness, definitely stated that petitioner, in saying that "the defendant in the

Smith Act trial cannot get a fair trial", was talking about the Smith Act trial in Honolulu. (R. 183.)

Another witness, Mrs. Phyllis P. Morse, also testified that "she (petitioner) said there was no such thing as a fair trial under the present Smith Act case in Honolulu". (R. 184.)

These statements were put in honest and candid perspective by petitioner's own counsel, J. Garner Anthony, toward the close of the Ethics Committee hearing, thusly:

> "Mr. Anthony. I will say to the Committee right now—I have read these speeches and I would agree with the conclusion implicit in Mr. Dodge's question, namely that *this was a talk about what was going on in the Smith Act trial here in Honolulu. Now let's not fool ourselves about that. We're lawyers here.*" (Emphasis added.) (R. 526.)

The foregoing testimony amply supports the conclusion that petitioner's remarks were directed towards the Smith Act trial in Honolulu.

Petitioner insists that her attacks on what was going on at the trial did not encompass the trial judge. (Petition for Writ of Certiorari, pp. 22-25.) Apparently in view of the abundant corroboration of this fact in the record, petitioner does not make an issue of whether or not she actually said that shocking and horrible things went on at the trial. The news reporter Matsuoka noted that petitioner "Said she wanted to tell about some rather shocking and horrible

things that go on at the trial." (App. I, p. i.) He also testified that ". . . She said she wanted to tell the people about some of the shocking, horrible things that went on, and that the Smith Act trial could not be a fair one, and that they just had to go around and make rules to fit the situation . . ." (R. 151.)

Mrs. Olival positively testified that petitioner used the words "shocking and horrible things that were going on" in characterizing the Smith Act trials in Honolulu. (R. 172.)

Mrs. Phyllis P. Morse remembered that petitioner gave "various examples of things that I don't recall, that were going on, in what she called the horrifying, shocking trial." (R. 185.)

Petitioner's only contradiction of this overwhelming evidence of record is her testimony that she has no recollection of having made such a statement. (R. 527.) Through her counsel, J. Garner Anthony, she stated that she will not deny having made the statement. (R. 528.) In addition, there is of record the abortive attempt by petitioner's client, Jack Hall, to take the blame for saying that some rather shocking and horrible things are going on at the trial. (R. 395-398.)

Without belaboring this point in view of the weight of the evidence against the probability that no such statement was made in her speech, petitioner argues that there is nothing wrong with such a statement. She points out that many shocking and horrible things go on in the courtroom without any fault of the judge. (Petition for Writ of Certiorari, p. 24.)

The courts below found that the charges did constitute an attack upon the administration of justice and did impugn the integrity of the presiding judge and did tend to create disrespect toward the courts and judicial officers. These findings are established by clear and convincing proof. The news reporter Matsuoka notes that petitioner charged that "there is no such thing as a fair trial in a Smith Act case. All rules of evidence have to be scrapped or the government can't make a case . . . there's no fair trial in the case. They just make up the rules as they go along." (App. I, p. vi.)

Matsuoka testified at the hearing that petitioner charged "that the Smith Act trial could not be a fair one, and that they just had to go around and make the rules to fit the situation." (R. 151.)

In fact, petitioner admitted before the Committee and to Judge Wiig that she did charge that "There's no such thing as a fair trial in the Smith Act case" (R. 443, 444), and in explanation of this charge, she added that there is no such thing as a fair trial in any Smith Act case, including the Smith Act case then going on in Honolulu. (R. 445.)

Mrs. Thelma Olival also testified that "Jack Hall was being tried on something that he read many years ago, and she said that in the Smith Act trial there were no rules, and that they were making up the rules as they went along, . . ." (R. 172.)

Daniel Ramos also testified that "she said there was no fair trial in the Smith Act case." (R. 179.) So did David K. Crabb who testified that petitioner said the

defendant in the Smith Act trial in Honolulu cannot get a fair trial. (R. 183.)

Mrs. Phyllis P. Morse corroborated the fact that petitioner attacked the type of evidence being admitted in the *Fujimoto* trial, thusly: "A. Well, she said that the government could submit any evidence they liked at any time, and that they could also use books that might not have any bearing on the case." (R. 185.)

In support of this theme that there could be no fair trial in the Smith Act case because all the rules of evidence were being scrapped so the government could make its case and the rules of evidence and procedure were made up as the case proceeded, petitioner specifically referred to various happenings which were transpiring in the Smith Act case then being tried in Honolulu. In fact, petitioner admitted picking four illustrations from the *Fujimoto* case to speak about in this connection, specifically naming Johnson and Crouch, two witnesses who testified in the *Fujimoto* case. (R. 450-451.) In referring to the testimony of Johnson, she stated that Johnson came back from San Francisco with Communist books and literature in a duffel bag, that Johnson testified that when he got to Honolulu he told Jack Hall the names of some of the books. She charged that the government then for two days of the trial read from the books supposed to have been in the duffel bag and not with what Jack Hall said. She further stated that on cross-examination Johnson testified that he didn't show the books to Jack Hall, but showed only the duffel bag. (App. I, pp. iv-v.)

Petitioner's client, Jack Hall, confirmed the news reporter's notes on this point. He testified that petitioner did talk about the testimony of Johnson in the Smith Act trial in Honolulu. (R. 406.) He also testified that petitioner talked about the "duffel bag evidence" in this connection. (R. 406.)

Petitioner also testified: ". . . I did make a statement concerning Mr. Johnson showing Mr. Hall a duffel bag containing books and I explained on the basis of Mr. Hall's having seen the duffel bag, the books contained in the duffel bag had been admitted into evidence." (R. 455.)

Petitioner's charge about Johnson's testimony is also confirmed by John D. Morse. (R. 167.)

The record discloses that petitioner also referred to the testimony of Paul Crouch, another witness in the *Fujimoto* trial. (R. 450.) Petitioner specifically admitted that she referred to Crouch's testimony in order to show the people present what kind of testimony was going on at the trial. (R. 454.)

The news reporter Matsuoka's notes state that petitioner charged that in the *Majors-Palakiko* habeas corpus case in which petitioner was involved, the Supreme Court of the Territory refused to allow the testimony of a woman who reported to her that a police officer beat a confession out of one of her clients because the police officer was not present to deny her testimony. Yet "with the same situation a federal judge sitting on a federal bench permits Crouch to testify about 27 years ago, what was said then." (App. I, p. vi.)

When questioned about the evidence, petitioner testified thusly:

> "The Witness. Those are not my words. The substance, the fact that I was in the Majors-Palakiko case—that in that case the Supreme Court of the Territory had refused to permit Mrs. Hughes' testimony; that Vernon Stevens had told her that he had beaten Palakiko was not permitted by the Supreme Court; whereas in the Smith act case in general, as well as in this Smith Act case, people who had been many years away and had never seen this defendant were permitted to testify.
>
> Mr. Barlow. In other words, would it be fair to say that you paralleled that with the phrase that Mr. Matsuoka attributes to you: 'With the same situation, a Federal judge sitting on a Federal Bench, permits Crouch to testify about 27 years ago what was said then'?
>
> The Witness. I used the Palakiko-Majors case as a contrast to Mr. Crouch's testimony and the hearsay testimony in the conspiracy case.
>
> Q. That Judge Wiig was allowing in the present Smith Act case, is that right?
>
> A. The motions hadn't been argued yet.
>
> Q. No, but that Judge Wiig was allowing in the present Smith Act case?
>
> A. Yes, he was." (R. 457.)

This attack on the action of Judge Wiig in the *Fujimoto* case as compared with the action of the territorial court in the *Majors-Palakiko* case is also referred to in the recorded testimony of Gilbert Ferreira. (R. 163.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958
No. 326

In the Matter of Disciplinary Proceedings against
HARRIET BOUSLOG SAWYER,
a Member of the Territorial Bar of the Territory of Hawaii,

Petitioner.

REPLY MEMORANDUM TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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1. Respondent contends that this disciplinary case is "of a local, territorial nature with no federal implications". (Br. p. 3.) The test here is not the local character of the authority which took the action complained of or the source of the license of which Petitioner was deprived. Rather is it the existence of a violation of one or another safeguard extended by the federal constitution. As this Court once observed in response to contentions similar to that offered by Respondent,

> "There are village tyrants as well as village Hampdens, but none who acts under the color of law is beyond the reach of the Constitution."
>
> *West Virginia v. Barnette,* 319 U. S. 624, 638.

Said men in power are trying to put men in jail because of their thoughts. and books written before he was born.

One of the reasons Jack Hall is on trial is because it is said he once got a book, the Communist Manifesto, written in 1898, before Jack Hall was a gleam in his father's eye.

She quoted from manifesto: a spectre is haunting Europe; the spectre is communism. She explained spectre means ghost. Said spectre still seems to be haunting people today.

---

she turned next to conspiracy. noted there was a conspiracy trial in 1937 of filipino brothers. conspiracy to advocate violence and criminal sindicalism. explained conspiracy means agreement. government never has used conspiracy when it had a case. when it hasn't got enough evidence it lumps a number together and says they agreed to do something. the government does not say . . advocated overthrow but says they agreed to. conspiracy means to charge a lot of people for agreeding to do something you have never done.

---

touched on myth of agents of fbi. they're supposed to be extra special. radio programs, movies, publicity tell how wonderful they are. but when you see hundreds of tax fraud cases go by and when they spend most of their time investigating people's minds it's

time to cut them down to size. said she had told this to a honolulu gathering. labor day? fbi agents should be called federal cops. said has slogan: put away your thoughts here come the federal cops. cops push people around.

---

paul crouch. difficult to understand why he's witness. but he was here in 1924; because he was once in Hawaii, so guess that's why. he testified what he did in russia in 1927. he told what he was told by generals etc. usually you can ot testify on what people told you when there is no chance for those to be cross examined. aileen fujimoto was four years old then. what has crouch's galloping over the plains of russia got any bearing on her. jack hall was 13. but the government goes on with testimony for two weeks on what crouch did between 1927 and 1941 without ever mentioning the defendants.

---

he told of infiltration of the armed forces and plots .... it used to be the idea that a man is responsible for what he did and said—not what someone else did. not a single one of the defendants was of age at the time he's talking about. the jury is not going to pay attention to what Crouch says. but it's the old smear. the prosecution says crouch did this and that and we (prosecution) say the defendants are communist party members so they must have done the same.

but government propaganda has been going on for 10 years before the jurors went into the jury box.

it's enough to say a person is a communist to cook his goose.

the government says there was an agreement to violate the smith act which was passed in 1940. then the defendants agreed to violate it before it was passed. crouch sayd he was at a communist meeting in 1941 and saw five or six people there. it was the first time he'd seen them. but he was satisfied when he came to honolulu 12 years later that one was Koji Ariyoshi. she urged audience try to recall what they did 12 years ago. said she can't recall details. god knows no one has a memory that good. yet they use this kind of testimony.

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why? because they will do anything and everything necessary to convict.

some of the witnesses testified differently from what they testified previously. the government knows this but deliberately goes ahead and have him say things in order to convict. mentioned izuka in reinecke trial testimony. said something about izuka saying he didn't know the party advocated overthrow of government until he got out of party.

witnesses testify what government tells them to. just as they read portions of books like overthrow the government and leave out the rest which says czarist government showing it dealt with russia.

---

johnson testimony. said he came back from san francisco with communist books and literature in a duffle

bag. he said when he got to Honolulu he told Jack Hall the names of some of the books. then the government for two days reads from books supposed to have been in the duffel bag. they're not dealing with what jack hall said.

on cross examination johnson said he did not tell the names of the books but just showed jack hall the duffel bag. so jack hall violated the smith act because he saw a duffel bag with some books on overthrowing the government in it. it's silly. why does the government use your money and mine to put people in jail for

---

the government has carried on a barrage of propaganda for many years and expects people in the jury to have hysteria just hearing about communism is enough to jail. said has a friend who worked for sears roebuck and has family of three children and wife. he made a terrible mistake one time. in 1941 he lived in the same house as jack hall. the fbi wanted him to testify. he said i feel jack hall is one of the finest people i have known. apparently the fbi didn't like this. so they suggested to sears and roebuck to fire him because he wouldn't cooperate with the government.

---

he wasn't fired so they went to the Los Angeles and Chicago offices of sears and roebuck and convinced them he had to be fired. he was fired because he refused to be a stool pigeon and informer. the government gets

away with it by making people fear that if they don't do as it wants they'll be branded red and lose their jobs.

there's no such thing as a fair trial in a smith act case. all rules of evidence have to be scrapped or the government can't make a case.

referred to her habeas corpus move in the palakiko-majors case.

---

said a woman came to her with report she heard vernon stevens say he beat a confession out of one of them. she testified but the supreme court refused to let the evidence in because vernon stevens was not here and had no chance to deny this. with the same situation a federal judge sitting on a federal bench permits crouch to testify about 27 years ago. what was said then.

in the previous case it was the life and death of one. and yet here they permit a witness to tell what was said when a defendant was five years old.

---

there's no fair trial in the case. they just make up the rules as they go along.

the first smith act case was in 1949 of the new york top leaders. attorneys contended they should have the right to say what they did from 1924. medina permitted them to say what the defendants themselves did from 1924 on. but the government can't make a

case if it tells just what they did so they widened the rules and tell what other people did years ago, including everything including the kitchen sink.

---

unless we stop the smith trial in its tracks here there will be a new crime. people will be charged with knowing what is included in books. ideas.

mentioned los angeles trial in which someone said there was no evidence that someone had instructed persons not to read some books.

said there'll come a time when the only thing to do is to keep your children from learning how to read. then not only will unions be destroyed by so will freedom of thoughts and action. there'll be dark ages of thought control when people won't be able to speak freely in taverns and other places.

she urged audience to go out and explain what a vicious thing the smith act is. people are tried for books written years ago.

TABLE OF AUTHORITIES CITED

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STATUTE	
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In *Konigsberg*[1] and *Schware*[2] this Court made clear that state exclusion of applicants to state bars done by standards or methods that were arbitary or discriminatory presented Fourteenth Amendment problems under the due process and equal protection clauses. In *Theard*[3] the Court observed that these cases laid down the limits for review in state "disbarments". These cases establish the basis for action here. *Konigsberg* and *Schware* reviewed state action against the contention (similar to that made by Petitioner here) of arbitary fact finding. In both cases the Court held that the evidence must "rationally support" the findings against the lawyer. The contention that due process of law has been denied by findings not so supported has of course long been recognized as the cases cited in the Petition (p. 25) and in the dissent (App. A, pp. 42-44) so plainly demonstrate.

Similarly as to claims such as Petitioner's here, that local action has offended free speech. While in *Konigsberg* this Court found it unnecessary to reach the First Amendment problems presented, it seems clear that it felt its review would reach such questions if necessary. (353 U. S. at 261, 269, 273.) In *Barnette, supra,* First Amendment protection was accorded grade school children expelled by their local school board. Petitioner is equally entitled to the protection of the federal constitution—the more so because the failure to give her that protection will adversely affect the independence of the entire American bar.

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[1]353 U. S. 252.

[2]353 U. S. 232.

[3]354 U. S. 278, 281.

Petitioner has properly presented federal questions because she has demonstrated that the action below has contravened specific protections afforded by the federal constitution. In addition she has pointed to two other questions (Nos. 3 and 4, see Petition, pp. 3, 27-33) involving the supervisory powers of this Court. In deciding the one numbered three the court below established principles binding upon at least all federal courts in the Ninth Circuit and perhaps for the country as a whole. The decision of number four affects the relationship of the federal judiciary to the court systems of all Territories. In no sense is this cause a "local, territorial" matter.

2. In connection with Petitioner's free speech points, Respondent (Br. pp. 7-10) urges that the clear and present danger test has no application. Petitioner's position is that this test or some other rubric by which speech is balanced against legitimate interests of the state must apply to vouchsafe to Petitioner and lawyers generally the minimal protections of the First Amendment. Petitioner's position is that *Bridges*, *Pennekamp* and *Craig* apply here because these utterances were made outside the court room, not in the court room.[4] Respondent's only authorities for its novel and unsupported position to the contrary are the *Sacher*[5] and *Fisher*[6] cases, wherein the lawyers' utterances and conduct occurred in the courtroom and in the face of the judge. No one would contend that the same standards govern the lawyer's right to

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[4]Petitioner concedes that as a lawyer she was under limitations of speech not imposed on laymen generally. These deal with maintaining the respect due the courts. The speech here involved did not transgress these limitations. (Pet. pp. 26-27.)

[5]343 U. S. 1.

[6]336 U. S. 155.

address an audience gathered in a theatre and his right to make remarks in the face of the court which violate the judge's rulings.

3. Petitioner does not, as respondent suggests, seek to have this Court substitute its judgment for the fair-minded judgment of lower courts on disputed facts. (See Resp. Br. p. 22 ff.) Petitioner claims, *inter alia*, that she has been deprived of significant First and Fifth Amendment protections by arbitrary fact finding. The assertion of such a claim calls for this Court's reappraisal of the evidence. *Konigsberg, supra; Schware, supra; Norris v. Alabama*, 294 U. S. 587; *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287. See also cases cited in dissent below. (App. A, pp. 42-44.) We seek here no resolution of factual conflicts. There are no real conflicts in the evidence. We take it at face value and assert that the findings and conclusions of either of the lower courts. (Pet, pp. 21-26, 8-10; Appendix G to Petition at pp. 78-82; see also dissent below, App. A, pp. 45-50.)

Thus, contrary to Respondent's interpretation of Petitioner's position (Br. pp. 24-28), Petitioner does not present a factual issue as to whether her speech was directed to the Honolulu Smith Act trial before Judge Wiig. We of course assert that it did speak of that trial and that it spoke critically. We do not contend that taking all the evidence on its face, nothing in that speech attacked Judge Wiig for wilful partiality or lack of integrity. Petitioner's criticisms of the trial pertained to the conduct of the government and its prosecutors, the F.B.I. and its informer witnesses, the dangers of a sedition statute and of the conspiracy theory. In this she voiced criticisms that inhered in the nature of a trial for conspiracy to violate the Smith Act during the fear-ridden

days of the cold war. The words of the dissenting judges well state our position:

> "This record does not warrant a conclusion that the integrity of Judge Wiig was attacked. Everything in it is consistent with appellant's position that the speech was directed at Smith Act prosecutions and the Smith Act, and not at Judge Wiig personally. Some of the remarks quoted in the notes she denied making, but I assume for the purposes of this opinion she made all of them, just as the notes show." (App. p. 47.)
>
> "What we have here is an attack on the methods used in all Smith Act prosecutions, including the one then pending and hence, implicitly an attack on the Smith Act itself." (App. p. 45.)

4. Respondent builds its argument mainly upon a finding anent a remark about scrapping all the rules of evidence. (Br. pp. 32-34.) This, it contends, necessarily shows that Petitioner attacked Judge Wiig's integrity. But the court below did not find that remark to have been made at all. (App. A, p. 14.) In this the court below appears not to have sustained the territorial court. (*Cf.* R. 117.] The only finding close to this made by the court below was "that 'they' just made up the rules as 'they' went along." In the Petition (p. 24) it was pointed out that of all the witnesses whose testimony bore on this point, four used the noun government as the subject of the sentence and two (including Matsuoka in his "notes") used the pronoun "they". To convert such testimony into a reference to the judge is a sample of what Petitioner contends is arbitrary fact finding.

However if the finding of the territorial court about scrapping the rules of evidence is still in the case, it too

is a product of arbitrary fact finding. The evidence is that Petitioner said "all rules of evidence *have to be* scrapped or the government can't make a case". (Matsuoka "notes", Resp. Br. App. p. vi.) The territorial court transmuted the statement to read "all the rules of evidence *were being* scrapped so the government could make its case". [R. 117.][7] So framed the remark more nearly appears to be directed at what the trial judge was then doing in the *Fujimoto* trial. But the evidence does not have it that way and the context of the remark shown by the notes plainly indicate that Petitioner addressed herself to the problems of the all-encompassing breadth of conspiracy trial evidence. (See dissent below, App. A, p. 49.) Respondent's opposition to the Petition rests on the same arbitrary treatment of the evidence as does the finding of the territorial court.

5. Finally, Respondent deals with the remark about creating a new crime. (Br. pp. 33, 34.) The finding of the court below was this:

> "That unless the Smith Act trial at Honolulu was stopped in its tracks there would be a new crime—people will be charged with knowing what is included in books." (App. A, p. 14.)[8]

Petitioner claims that to make of this an attack upon Judge Wiig's integrity is arbitrary fact finding. For it is obvious that Petitioner was saying that prosecutions of this kind threaten to result in the definition of a new crime, thought control. She in no wise attacked Judge Wiig.

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[7]Emphasis added in each instance.

[8]The only evidence on this point is found in Matsuoka's "notes". (See Resp. Br., App. p. vii.)

Respondent (Br. pp. 33, 34) sets out the finding in the words of the territorial court thus:

> ". . . that unless the trial was stopped in its tracks certain new crimes would be created." [R. 117.]

That is plain distortion of the evidence by truncation, for it omits the second half of the sentence which gives the meaning of the whole.

Given either version of the finding, Petitioner was gravely deprived of due process.

6. Assessing the four remarks found by the court below (App. A, p. 14), those numbered 1, 2 and 4 have support in the evidence, but to hold them to be an attack on the trial judge impugning his integrity is arbitrary and without rational support. The finding numbered 3, glossed as it is to make "they" include the trial judge, is plainly contrary to the evidence. Turning to the five remarks found by the territorial court the first, second and fourth have evidentiary support but do not rationally justify the inference that they impugned Judge Wiig's integrity. The third constitutes, as indicated above, a metamorphosis of the evidence, and the fifth a mutilation of it.

This is a classic situation in which the Court makes its own appraisal of the evidence to see that it "rationally justifies" the findings *(Konigsberg* and *Schware, supra)*, to see that "no constitutional freedom, least of all the guaranties of the Bill of Rights, be defeated by insubstantial findings screening reality." *(Meadowmoor, supra,* p. 293.)

Respectfully submitted,

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 16 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958
No. 326

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Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF PETITIONER.

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IN THE

Supreme Court of the United States

October Term, 1958

No. 326

In the Matter of Disciplinary Proceedings againt HARRIET BOUSLOG SAWYER, a Member of the Territorial Bar of the Territory of Hawaii,

Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF PETITIONER.

Opinions Below.

The opinion of the court below is officially reported at 260 F. 2d 189. A copy is set out at R. 548 (majority), R. 584 ff (concurring), R. 588 ff (dissent).

The opinion of the Supreme Court of the Territory of Hawaii (herein called the Territorial Court) is officially reported at 41 Haw. 403. A copy is set out at R. 93 ff.

Jurisdictional Grounds.

The judgment of the Court of Appeals was entered June 9, 1958. The petition for writ of certiorari was filed August 27, 1958. The petition was granted November 17, 1958. The printed record was received by petitioner's counsel January 5, 1959. With the consent of

all counsel the time for filing this brief was extended to and including February 16, 1959.

Jurisdiction of this Court is invoked under 28 U. S. C. 1252(1).[1]

Questions Presented.

1. Whether a lawyer may be disciplined in a manner tantamount to disbarment[2] because of having made public comment concerning a pending case in which he is one of counsel of record

(a) merely because he is counsel of record in the pending case and therefore "under restraints not applicable to the public in general";

(b) without reference to, indeed in rejecting, the clear and present danger rule (see *Bridges v. California*, 314 U. S. 252, 273; *Pennekamp v. Florida*, 328 U. S. 331, 347);

(c) notwithstanding that the comment falls short of utterances which (i) endanger the fair administration of justice or (ii) fail to maintain the respect due the courts as the usual course of decision has defined that term;

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[1]Jurisdiction of the court below was invoked under 28 U. S. C. 1293 on grounds that the case was one "involving the Constitution . . . . of the United States" and wherein the "value in controversy exceeds $5000.00." Petitioner's affidavit as to jurisdictional amount under 28 U. S. C. 2108 [R. 622] was uncontroverted.

[2]The judgment of the Territorial Court is tantamount to disbarment. For under Rule 15(d) of the Rules of the Territorial Court (App. p. 84) an attorney suspended for more than six months must again, "as though applying for admission to the Bar," satisfy that court both as to good moral character and requisite legal learning.

(d) upon evidence that lacks solid and convincing proof of offending conduct and supports reasonable inferences consistent with innocence.

2. Whether the findings of the Territorial Court, approved by the court below, to the effect that petitioner "engaged and participated in a wilful and oral attack upon the administration of justice in and by the said United States District Court . . . and by direct statement and implication impugned the integrity of the judge presiding therein" rest upon such dogmatic inferences as to be wholly unwarranted and are so arbitrary as to offend due process.

3. Whether in the federal courts it is a disciplinary offense for a lawyer, after verdict, to interview trial jurors concerning matters occurring in their deliberations where the lawyer is investigating remarks of the juror concerning wrongdoing and frameup in connection with the trial and verdict.

4. Whether the judgment of the Territorial Court affirmed by the court below, was beyond the jurisdiction of the former and contrary to sound policy governing relations between territorial courts and federal courts in that it purports to set standards of conduct for an attorney with respect to conduct in a federal court and concerning matters pending therein and inevitably affects the right of that attorney to practice before the federal court.

5. Whether by virtue of the arbitrariness of the findings of the court below and the intrusions upon freedom of expression sanctioned and declared by the court below, there have been fashioned standards of professional conduct that menace the independence of the bar in general and the bar of the federal courts in particular.

Provisions of Constitution, Statutes, Regulations Involved.

The United States Constitution, First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (U. S. C. A., Constitution, p. 46.)

United States Constitution, Fifth Amendment:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ." (U. S. C. A., Constitution, p. 47.)

28 U. S. C., Section 1293:

"The courts of appeal for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii, respectively, in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs."

28 U. S. C., Section 2108:

"Where the power of any court of appeals to review a case depends upon the amount of value in controversy, such amount or value, if not otherwise satisfactorily disclosed upon the record, may be shown and ascertained by the oath of a party to the case or by other competent evidence."

Section 9701, Rev. Laws of Haw. (1945), as amended:

> "Section 9701. Qualifications. The Supreme Court shall have the power to examine, admit and reinstate as practitioners in the courts or record such persons of good moral character who are citizens of the United States of America, and who have taken the prescribed oath of office, as it may find qualified for that purpose, but no person shall be examined, admitted or reinstated unless he is qualified under the Hawaiian Organic Act to vote in the Territory of Hawaii and shall have actually registered as such voter; and the Supreme Court shall have the sole power to revoke or suspend the license of any such practitioners or to dismiss or suspend them from the roll of practitioners for malpractice, fraud, deceit or other gross misconduct."

Rule 19, Rules of the Supreme Court of the Territory of Hawaii, as amended October 31, 1953. (39 Haw. 707). Text set forth in Appendix, pages 77-79.

Rule 19, Rules of the Supreme Court of the Territory of Hawaii, as amended April 21, 1954 (unreported). Text set forth in Appendix, pages 80-83.

Rule 15(d), Rules of the Supreme Court of the Territory of Hawaii (effective October 3, 1955). (40 Haw. 764). Text set forth in Appendix, page 84.

Rule 1, Rules of Civil Procedure for the United States District Court for the District of Hawaii (as amended and effective March 21, 1955) (unreported). Text set forth in Appendix, pages 85-87.

Statement of the Case.

The Judgment and Its Effect.

The court below affirmed the judgment of the Territorial Court that petitioner "be suspended and prohibited from practice, either directly or indirectly and in any manner whatsoever" for a period of one year.[3] [R. 118.] As already indicated this suspension has the effect of disbarment.

The Proceedings in the Territorial Court.

This case originated with a complaint of the Bar Association of Hawaii filed July 8, 1954 [R. 3, 4], alleging unprofessional conduct by reason of (a) things said by petitioner in a speech given at Honokaa, Hawaii, on December 14, 1952 and during the trial of a case entitled *United States v. Fujimoto* in the District Court for the District of Hawaii,[4] she being one of counsel therein, and (b) interviews in late June, 1953, of a juror in that case after verdict.[5]

Following a hearing on the complaint before the Legal Ethics Committee of the Territorial Court, and upon the report of that Committee [R. 14-18] the Territorial Court ordered petitioner to show cause why the findings, conclusions and recommendations of the Committee should not be adopted. The matter was argued and submitted to the Territorial Court upon the record made before the Legal Ethics Committee.

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[3]That judgment was stayed, pending appeal, by the court below. [R. 624.]

[4]That cause arose upon an indictment charging conspiracy to violate the Smith Act (18 U. S. C. 2385). The judgments of conviction were later reversed by the court below. *Fujimato v. United States*, 251 F. 2d 342.

[5]The complaint as to the juror episode was amplified by a bill of particulars. [R. 5-13.]

The Evidence and the Findings—the Honokaa Speech.

Petitioner made a speech at the time and place and under the circumstances alleged. The *Fujimoto* case was then at trial in Honolulu before the Honorable Jon Wiig, United States District Court Judge for the District of Hawaii. Honokaa is situated on a different island from Honolulu some 182 miles distant.

It was charged and the Territorial Court found that under these circumstances and concerning that trial, petitioner had said that horrible and shocking things were going on; that a fair trial was impossible; that all of the rules of evidence were being scrapped so the Government could make its case; that the rules of evidence and procedure were made up as the case proceeded; and that unless the trial was stopped in its tracks certain new crimes would be created. Upon these findings that court made the following conclusions:

> ". . . she engaged and participated in a wilful oral attack upon the administration of justice in and by the said United States District Court for the District of Hawaii and by direct statement and implication impugned the integrity of the judge presiding therein and in the said pending case, within the territorial boundaries of the Territory of Hawaii, and thus tended to also create disrespect for the courts of justice and judicial officers generally, . . . She has thus committed what this court considers gross misconduct." [R. 118.]

There is no transcript or other verbatim account of petitioner's speech. A newspaper reporter named Matsuoka took longhand notes preparatory to writing the newspaper article referred to by the majority below. [R. 152, 153, 559, 560.] A later version of these notes,

"slightly expanded" and prepared at the request of Matsuoka's editor following the "to-do about it in court" [R. 152, 153, 156, 159, 160] was received in evidence. The dissenting judges below accepted as accurate the version of petitioner's speech contained in these notes. Petitioner accepts them as the best available evidence of what she said.[6]

We summarize these notes:[7] (1) the trial is really of Jack Hall to get at the I. L. W. U.; (2) she wanted to tell about some rather *shocking and horrible things that go on at the trial;*[8] (3) MEN IN POWER are trying to put people in jail for what they think or read; (4) this is a conspiracy case and the GOVERNMENT uses conspiracy when it does not have a case—"conspiracy means to charge a lot of people for agreeing to do something you have never done"; (5) there is a myth about F.B.I. AGENTS—they spend their time investigating people's minds while hundreds of tax fraud cases go unpunished; (6) PAUL CROUCH is a witness because he was in Hawaii in 1924. His testimony of what he did in Russia in 1927 has no bearing; that was when Fujimoto was four years old and Hall was 13. He testified for weeks without mentioning a defendant; (7) a man should be responsible only for his own acts, not others; this is smear, part of the GOVERNMENT's propaganda that started before the

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[6]Petitioner also gave a near-contemporaneous version of her speech when she reported to Judge Wiig on the first court day after the speech had been given. Her statement is set out at R. 578-584.

[7]The notes are set out *in haec verba* at R. 573-578, and they are summarized in the dissent. [R. 593-595.]

[8]In this summary the words which are italicized pertain to the findings of the lower courts; they are set out in the precise language of the notes. The words in capital letters indicate the subject of most of the ideas and the objects of petitioner's criticisms.

jury was selected; (8) CROUCH testified to things no one could remember 12 years; (9) "THEY" use this kind of testimony "because THEY will do anything . . . to convict"; (10) the GOVERNMENT deliberately uses witnesses whose testimony is different from previous testimony and "have him say things in order to convict," "witnesses testify what the GOVERNMENT tells them to"; (11) JOHNSON testified about books in a duffel bag and Jack Hall is said to have violated the Smith Act because he saw a duffel bag with books in it. The GOVERNMENT reads from the books, "they're not dealing with what Jack Hall said"; (12) the GOVERNMENT has carried on a propaganda barrage so long that "just hearing about communism is enough to jail"; (13) the F.B.I. pressures people to testify and causes them to lose their jobs if they won't cooperate and become informers; (14) *There's no such thing as a fair trial in a Smith Act case. All rules of evidence have to be scrapped or the government can't make a case;* (15) in the *Palakiko-Majors* case[9] testimony of an admission of having coerced a confession was excluded because the declarant was not available to deny it but in the same situation a federal judge let CROUCH testify about 27 years ago when a defendant was five years old; (16) *There's no fair trial in the case. They just make up the rules as they go along;* (17) in 1949 Judge Medina permitted evidence as to what the defendants did from 1934 on, "but the GOVERNMENT can't make a case if it tells just what they did so THEY widened the rules and tell what other people did years ago . . . including the kitchen sink"; (18) *Unless we stop the Smith trial in its tracks here there will be a*

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[9]See *Palakiko v. Harper* (9 Cir.), 209 F. 2d 75; cert. den. 347 U. S. 956. Petitioner was counsel of record there.

new crime. People will be charged with knowing what is included in books. Ideas; (19) we are threatened with "dark ages of thought control when people won't be able to speak freely"; (20) "she urged her audience to go out and explain what a vicious thing the Smith act is."

The testimony of the witnesses concerning the Honokaa speech is fragmentary in the extreme. They give only snatches from the speech and make no attempt to present its full text or to set the isolated remarks in their context. No witness attempts to quote petitioner's language. The testimony of each witness is summarized below.

Matsuoka (newspaper reporter, "Hilo Tribune Herald"):

> ". . . She said she wanted to tell the people about some of the shocking, horrible things that went on, and that the Smith Act trial could not be a fair one, and that they just had to go around and make rules to fit the situation. That was, I think, the general trend." [R. 151.]

On cross-examination he gave this testimony:

> "Q. It [petitioner's speech] was a general criticism as to the character of the criminal proceedings brought under the Smith Act, isn't that a fair statement? A. Yes, a portion of that speech, I think." [R. 161.]

Ferreira (worker at Honokaa Sugar Company):

> "She started off telling us about the Smith Act trial; that there was no fair trial in the Smith Act case; that the government—I mean, they made up their rules as they went along in Smith Act trial, and she compared the Majors-Palakiko case with the Smith Act trial, and she also stated that in the Smith Act trial they tried you on a conspiracy, and

'conspiracy' was explained to us, not the exact wording, but was something that they tried you for, for your thoughts; in other words, something that some people think, or you might think of, or this person might think of doing some day, but never actually did, but that is how she explained it on this conspiracy. * * *

Q. Did she mention any particular locality when she was talking about the Smith Act trial? A. If I remember right it was in Honolulu, but I am not too sure about that; I think it was down here." [R. 163-164.]

John D. Morse (Industrial Relations Director, Honokaa Sugar Company):

"Yes, I recall a few things. I did hear her say that there is no such thing as a fair trial in a Smith Act case, and she said that. Well, she talked quite a bit about Jack Hall, Mr. Hall was there; about the trial that was going on at that time. Q. Did she in anywise talk about the rules of evidence in the Smith Act trial? A. Yes. I don't remember word for word, naturally, but she did say that in a Smith Act case that the government permitted evidence that was primarily in their favor—in favor of the government. [R. 165.] * * * Q. Mr. Morse, do you remember Mrs. Bouslog making any statement as to whether there was such a thing or not as a fair trial in the Smith Act case? A. I remember her saying there was not such a thing as a fair trial in a Smith Act case. [R. 167.] Q. And do you remember whether she referred to the conduct and manner in which it was being handled? A. Well, it tied in, I figured it, tied in with any Smith Act case, whether in Honolulu, New York, or whatever it was; that is the impression I got from what she said." [R. 167.]

Olival (Women's Editor, "Hilo Tribune Herald"):

". . . . She said that the trial was against Jack Hall, and six others were just brought in, and that its purpose was to get at the ILWU; she said that Jack Hall was being tried on something that he read many years ago, and she said that in the Smith Act trial there were no rules, and that they were making up the rules as they went along, and she said that the F.B.I. could be called Federal cops, and that when the government—they were stressing this case, and when the government—that witnesses were afraid to testify, and they testified usually what the government wanted them to testify. * * * Q. Mrs. Olival, did Mrs. Bouslog use a phrase indicating that there were rather shocking and horrible things that were going on at the trial? A. Yes, she used those." [R. 171-172.]

Ramos (clerk, Honokaa Sugar Company):

"I said she said there was no fair trial in the Smith Act case. * * * It has been so long that most of it I have forgotten." [R. 179.]

Andrade (worker, Honokaa Sugar Company):

". . . She said she would like to tell the audience of the horrible and shocking things that went on at the Smith Act trial in Honolulu, and she also gave several illustrations, but, I am sorry, I cannot remember them, and she also said that the Federal government had created the evidence as they went along, and she referred to the F.B.I. men as Federal cops, at which time she received hearty applause from the audience. There were approximately 250 people present. Most of them were union members, . . ." [R. 180-181.]

Crabb (office manager of Paauhau Sugar Plantation Company):

"Q. Will you tell the Committee what Mrs. Bouslog said? A. Well, that the defendant in the Smith Act trial cannot get a fair trial. Q. What Smith Act trial was she talking about? A. The one in Honolulu. Q. Did she say anything else? A. And in regard to the communism books, she said those who read those books might be prosecuted." [R. 183.]

Phyllis P. Morse (wife of John D. Morse):

". . . . she said that there was no such thing as a fair trial under the present Smith Act case in Honolulu, and that the newspapers were not giving a full account, a true account, and that from time to time they and we would be coming to the various islands to acquaint a group with the true facts. . . . that the government could submit any evidence they liked at any time, and that they could also use books that might not have any bearing on the case. . . . she gave various examples of things . . . that were going on, in what she called the horrifying, shocking trial." [R. 184-185.]

Hall (Regional Director for International Longshoremen's & Warehousemen's Union, defendant in Fujimoto case):

testified that he, not petitioner, made the "horrible and shocking things" remark. [R. 395.] He said that petitioner did not say the judge was making up the rules of evidence as he went along. [R. 397.] Petitioner said there were different rules of evidence in a Smith Act trial "as compared to the normal criminal trial." She criticized "the rules, not the rulings." [R. 397.]

The meeting was called by the I.L.W.U. defense committee which had been established to handle and finance the defense of Hall and other union members involved in Smith Act and related matters. [R. 401, 402.] The Honokaa meeting was "in the nature of a report back to those that contributed to [Hall's] defense." [R. 410.]

Petitioner:

Concerning the "horrible and shocking things" remark, petitioner testified at her hearing: "Two days afterward I stated to Judge Wiig that I had no recollection of ever making any statement of any kind of that character or having said those words." [R. 435.] She testified that she had said "There is no such thing as a fair trial in the Smith Act case." [R. 443.] She said she "was talking about the Smith Act and the Smith Act in general. . . . that there was no such thing as a fair trial in any Smith Act case." [R. 444-445.] She supplied her authorities for the view that under conditions existing at the time of the Honokaa speech, a Smith Act trial for Communists could not be fair. [R. 445-448.] Her purpose was to provide her audience with sufficient information to persuade them to the conclusion that the Smith Act "was a bad law which should be repealed." [R. 448.]

She denied saying "All rules of evidence have to be scrapped or the government can't make a case," and stated that her references to rules of evidence dealt with the explanation of the difference between those rules in a conspiracy case and in an ordinary criminal case, pointing out that the government took advantage of "a latitude under the rules of evidence in conspiracy." [R. 443-444.]

Concerning the alleged remark that unless the Smith Act trial were stopped a new crime would be created, petitioner said that her remarks in substance were these:

"I said that the Smith Act—continued prosecutions under the Smith Act can lead to a new crime of reading and thought control . . . . And I said that I felt that the Smith Act would be repealed as soon as people understood what the Smith Act was." [R. 459.]

Petitioner gave a narrative report of her speech to Judge Wiig on December 16, 1952, two days after the Honokaa meeting. [R. 578-584.] It will not be summarized here because in general it so closely parallels Matsuoka's notes. In this statement she admitted having said "there is no such thing as a fair trial in a Smith Act case." She said that she had explained this on the grounds that books were on trial and that the Government's pre-trial propaganda had created an hysterical climate of public opinion. [R. 578, 579.] Petitioner denied having said, "that all rules of evidence have to be scrapped or the Government can't make a case and just make up the rules as they go along, or words to that effect." [R. 582.] She said that she had no recollection of having said "that some rather shocking and horrible things were going on in this trial." [R. 582.] She told Judge Wiig that her criticism of the conspiracy prosecution was "drawn from authorities already cited to the court" [R. 580], and that her observations concerning the prosecutor's abuse of the latitude of admissibility of evidence in conspiracy trials were "in substance" what had been stated to the court in defense memoranda already

submitted in support of motions to strike.[10] [R. 580, 582.] Her statements in this respect have never been controverted. As the dissenters below read the Fujimoto record, petitioner was here referring to motions directed at the witness Crouch.[11] [R. 603.]

The Evidence and the Findings—The Interviews of the Juror Fuller.

Petitioner paid three visits in as many days to the home of one David Fuller, a juror in the *Fujimoto* case, beginning at a time about four days after the verdict in that matter had been returned. The initiative for these interviews came from a sister of the juror [R. 314, 210, 432], who reported that he had said that he wanted to confess that the case was a "frame-up." [R. 314.] Petitioner entered the juror's home with no objection from either the juror or his wife. [R. 316, 210, 472.] His wife confirmed to petitioner the report of the sister. [R. 476, 477.] The juror made similar statements to petitioner at the first visit. [R. 477, 318-321.] At petitioner's suggestion Fuller agreed to talk with Hall, one of the convicted defendants. [R. 322.]

Petitioner returned next day with Hall, when, partly as a volunteered statement and partly in response to questioning, the juror related a number of things that went on in the juryroom during deliberations. Most of the things set out in petitioner's affidavit to the trial judge [R. 42-45] were stated by the juror in the course of

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[10]Judge Wiig originally admitted Crouch's testimony subject to a motion to strike. His final ruling on the question came long after the Honokaa speech. [R. 398, 599.]

[11]Crouch was one of the "three perjurious witnesses" whose testimony tainted the record in *Communist Party v. SACB*, 351 U. S. 115.

this interview. [R. 487-495.] Both petitioner and Hall questioned the juror from time to time. [R. 418, 419, 495.][12]

Petitioner prepared an affidavit covering these interviews which was submitted to Judge Wiig in support of a motion for a new trial in the *Fujimoto* case. [R. 33-47.]

The Territorial Court held the interviews to be "gross misconduct" but apparently did not base its disciplinary judgment thereon. [R. 120, 121.] This interpretation of its action is reinforced by the court's finding that the practice of post verdict interviews of jurors "has not been uncommon, if not in fact common practice." [R. 119.] The majority below, however, read the Territorial Court's opinion as "a statement that the penalty for the two charges is imposed concurrently," although conceding that "the matter is not clear." [R. 568.] The court below said that, if it were reversing on the first charge (the speech), it would "refer the matter back to the Territorial Court to determine clearly and anew what sanction it intended to apply in the second charge." [R. 568.] It then proceeded to hold that "the evidence sustains the second charge." [R. 568.]

The Genesis of the Charges.

The origin of the charges against petitioner reveals a curious development of the rules of the Territorial Court so as to effect a special application to this case. The conduct laid against petitioner was engaged in while she was acting as one of counsel of record in the District

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[12]On the third visit there was apparently no discussion with the juror of matters which went on in the jury room. [R. 217, 218, 419, 420.]

Court and in relation to a case pending there. The investigation ordered by Judge Wiig [R. 31, 33] evoked no contempt or disciplinary proceedings in his court. At the end of the trial he complimented all counsel, including petitioner, for their "assistance, conduct and demeanor." [R. 510, 524.]

When the trial was over Judge Wiig, without indicating any position in the matter, asked the local bar association "to look into the conduct of Harriet Bouslog in connection with the Smith Act trial." [R. 539-541.] The bar association took no action while the matter was investigated by the Attorney General of the Territory. [R. 535, 536.] As the rules of the Territorial Court then stood, only the aggrieved party or the Attorney General could file complaints of attorneys' misconduct. (See App. p. 77.) When the Attorney General took no action the bar association devised an amendment to the Territorial Court's rules permitting the association to file such complaints. (See App. p. 80.) That rule was adopted in April, 1954, and the complaint was filed July 8, 1954, some 18 months after the Honokaa speech and over a year after the juror interviews. [R. 535, 536.]

The report of the Legal Ethics Committee was not made until July 1, 1955. [R. 15.] The Territorial Court's decision was rendered April 6, 1956 [R. 93 ff.]; that of the court below on June 9, 1958.

Petitioner's Professional Record.

Petitioner has been a member of the bar since 1936, in the Territory since 1941. [R. 428.] Her professional career has been exemplary. Commenting that "this is no ordinary case" [R. 589; see also R. 611-616] the dissenters below alluded to petitioner's distinguished record of representing unpopular clients. But this has been a

career which involves even more than representing victims of public prejudice or passion. Petitioner's professional career in the Islands has encompassed the emergence of unionization among the workers in the vast sugar and pineapple plantations as well as in the longshore industry of the Territory. The conflict of forces thus precipitated led not only to strike turbulence in the struggle for improved working and living conditions, but also to pressures to alter both law and custom affecting the social, civic and political participation of the great non-white masses in the community life of the Islands.[13] In this milieu petitioner served as lawyer for the workers, and her endeavors involved her in strike and picketing cases and the application thereto of national and local statutes; criminal prosecutions; challenges to the constitutionality of criminal statutes and jury selection systems; and suits to prevent racial discrimination. It is not an exaggeration to say that petitioner's work in these areas contributed to the resolution of profound and potentially explosive social conflicts through the processes of law and reason rather than by violence and destruction.

Out of the sugar strike in 1946 emerged the issues which led to the challenge to the Territorial statutes dealing with conspiracy and unlawful assembly and riot, as well as the practices in selecting grand and petit juries in the Territorial courts. Petitioner was counsel for plaintiffs in those cases and her position was sustained

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[13]See *e.g. International Longshoremen's and Warehousemen's Union v. Ackerman*, 82 Fed. Supp. 65, 74-86, 95-112, 113-122 (opinion by Circuit Judge Biggs), reversed 187 F. 2d 860 (9 Cir.), cert. den. 342 U. S. 859; *United States v. Fujimoto*, 105 Fed. Supp. 727, 729, opinion by Circuit Judge (now Chief Judge) Stephens. Both opinions contain penetrating analyses of the social conflicts in which petitioner served as a lawyer, helping to preserve and advance our cherished notions of rule by law.

by a three-judge court presided over by Circuit Judge Biggs of the Third Circuit. *ILWU v. Ackerman, supra.* Although the decision of that court was reversed on appeal for procedural reasons, the statutes on conspiracy and unlawful assembly and riot were modified or repealed to conform more closely with the positions advanced by respondent and approved by the three-judge court.[14] So also was the jury system modified in Territorial courts on the islands of Oahu, Maui and Hawaii.[15] Petitioner presented the challenge to the jury selection system in the District Court of Hawaii which was determined in *United States v. Fujimoto, supra.*

Also growing out of that sugar strike was litigation attacking the labor injunction practices of the Territorial courts and asserting the national policy enunciated in the jurisdictional limitations of the Norris-LaGuardia Act (29 U. S. C. A. 101 ff). *ILWU v. Wirtz,* 37 Haw. 404, 445; aff'd. 170 F. 2d 783, 9 Cir., cert. den. 336 U. S. 919, rehearing denied 336 U. S. 971. In another phase of the same attack was the suit brought under the civil rights statutes of the United States to restrain prosecutions under *ex parte* labor injunctions. *Alesna v. Rice,* 69 Fed. Supp. 987, complaint dismissed 75 Fed. Supp. 865, aff'd. 172 F. 2d 176, 9 Cir., cert. den. 338 U. S. 814. In both of these cases petitioner was counsel for the unsuccessful plaintiffs.

In 1947 there occurred an industry-wide strike in the pineapple industry. Widespread actions by the employers

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[14]The original statutes, Sections 11120 ff. (conspiracy) and Sections 11570 ff. (unlawful assembly) Rev. Laws Hawaii, 1945, were amended and in part repealed by Acts 10 and 62 respectively. Special Session Laws of Hawaii, 1949.

[15]This was done by judicial order and there is no official report.

to restrain picketing[16] were countered by efforts to enjoin the activities of the employers in the Federal courts under the civil rights statutes.[17] Petitioner represented the defendants in the actions brought by the employers and the plaintiffs in the actions brought under the civil rights statutes.

Petitioner represented the first public employee in the Territory to be dismissed for asserted connection with the Communist Party. She brought an unsuccessful action to enjoin the school board proceeding as violative of the federal civil rights statute (*Reinecke v. Loper* (D. C. Hawaii), 77 Fed. Supp. 333), and as well participated in his defense in the hearing before the Honolulu school commission. Later she represented witnesses asserting constitutional reasons for resisting political inquisition by the House Committee on Un-American Activities. When 39 of these persons were prosecuted for legislative contempt, petitioner and her partner represented them and gained their acquittal.[18]

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[16]*Hawaiian Pineapple Co., Ltd. v. I.L.W.U.*, Eq. No. 4729, First Judicial Circuit, Judge Willson C. Moore; *California Packing Corporation v. I.L.W.U.*, Eq. No. 4730, First Judicial Circuit, Judge Willson C. Moore; *Hawaiian Pineapple Co., Ltd. v. I.L.W.U.*, Eq. No. 322, Second Judicial Circuit [Maui], Judge Cable A. Wirtz; *Hawaiian Fruit Packers v. I.L.W.U.*, Eq. No. 123, Fifth Judicial Circuit [Kauai], Judge Phillip L. Rice; and *Hawaiian Canneries, Ltd. v. I.L.W.U.*, Eq. No. 122, Fifth Judicial Circuit [Kauai], Judge Phillip L. Rice.

[17]*Hall et al. v. Hawaiian Pineapple Company, Ltd.*, Civil No. 801, U.S.D.C., Hawaii, 72 Fed. Supp. 533; *Hall v. California Packing Corporation*, Civil No. 802, U.S.D.C., Hawaii; *Hall v. Willson C. Moore, as Judge of the Circuit Court of the First Judicial Circuit*, Civil No. 803, U.S.D.C., Hawaii; and *Hall v. Willson C. Moore, as Judge of the Circuit Court of the First Judicial Circuit*, Civil No. 804, U.S.D.C., Hawaii.

[18]See *United States v. Abe* (D. C. Hawaii), 95 Fed. Supp. 991, for ruling on preliminary motions; judgment of acquittal unreported.

In 1951-1953 petitioner helped save from execution two men who had been convicted of first degree murder under circumstances strongly indicating the influence of racial passion and prejudice upon the trial. Her attempts to obtain a writ of habeas corpus on these grounds were unsuccessful. *Palakiko v. Harper,* 39 Haw. 141, 39 Haw. 16, aff'd. (9 Cir.), 209 F. 2d 75, cert. den. 347 U. S. 956, rehearing den. 347 U. S. 979.[19] After the denial of certiorari, however, the Governor of Hawaii, Honorable Samuel Wilder King, commuted the death sentence to life imprisonment.

Finally, petitioner was one of counsel for the defendants in the only prosecution in the Territory for conspiracy to violate the Smith Act, *United States v. Fujimoto, supra.* The litigation in this matter was varied and bitter. It involved disqualification proceedings against District Judge McLaughlin reported at 101 Fed. Supp. 293, which was followed by application to the United States Court of Appeals for the Ninth Circuit for a writ of prohibition (9 Cir., No. 13283), after the submission of which Judge McLaughlin withdrew voluntarily; a challenge to the jury selection system, heard by Circuit Judge (now Chief Judge) Stephens and denied in his opinion reported at 105 Fed. Supp. 727; an application for a writ of prohibition bottomed on the jury selection practices alleged in the challenge which was denied by the Court of Appeals for the Ninth Circuit (*Fujimoto v. United States* (9 Cir.), 199 F. 2d 27) and by this Court, Mr. Justice Black dissenting, 344 U. S. 852; as well as numerous pre-trial motions submitted to Judge McLaughlin (102 Fed. Supp. 890) and later to Judge Wiig.

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[19]This is the "Palakiko-Majors case" referred to in the Matsuoka notes of petitioner's Honokaa speech. [R. 577.]

(107 Fed. Supp. 865.) The trial in that case lasted from November 5, 1952 to June 20, 1953. [R. 398.] Petitioner was counsel of record therein continuously from August 31, 1951, two days after the indictment was returned. [R. 141.] It was in connection with this case that Judge Wiig commended and thanked all counsel for their service to the court and their conduct and demeanor throughout the trial. [R. 510.]

Petitioner's professional career in the Islands has been marked with extensive service at focal points of social conflict. In some instances these were challenges to laws, practices and mores that buttressed the economically powerful and the racially favored. Such cases presented thrusts at the *status quo* powered by a deep-going realignment of social and economic forces. In other respects petitioner sometimes represented those called the little people whose rights often exceed in importance their economic capacities to secure them. In still others she represented the victims of public passion and prejudice as in the *Palakiko-Majors* case and the Smith Act case. Petitioner appears to have served in the noblest traditions of the bar, and no one mindful of the tensions created by profound social conflict can deny that she has made a contribution to government by law.

Summary of Argument.

1. The finding that in petitioner's Honokaa speech she impugned the integrity of Judge Wiig is arbitrary and not supported by the evidence. We deal here with verbal utterances orally evidenced. To be reliable such evidence must give the remarks with precision and in context. The testimony of the witnesses is fragmentary and fails to meet that standard. There are two con-

temporaneous versions of the speech as a whole. Matsuoka's longhand notes, "expanded" *post litam motam* as it were, and petitioner's oral report to Judge Wiig. We will rest our analysis on the notes, although their origin weakens their reliability and restricts the inferences to be drawn from them when based on interpretation of their meaning.

The court below, in an apparent reversal of ordinary analysis, seems to have rested its conclusions on a newspaper article (which is manifestly incomplete and takes remarks out of context) because the findings of the Territorial Court "implicitly sustain the accuracy of the published items."

The court below evinced no effort at studying the critical remarks in context. As the notes show petitioner was critical of the Smith Act trial then pending before Judge Wiig because it was a thought control and book reading trial, because it was a trial for conspiracy rather than the substantive offense, because as a conspiracy trial there was a prejudicial latitude in the admission of evidence, because the government's propaganda created a climate of hysteria and fear, and because the government used unreliable witnesses. This is not an attack or reflection upon Judge Wiig.

Studied in context the isolated remarks found against petitioner cannot properly be given a meaning as an attack upon the court or as impugning the judge's integrity. Moreover, taken alone and on their face, those remarks as found do not support the findings.

Considering the evidence as a whole, it is unreliable and dubious. It is a layman's effort to reproduce a lawyer's explanation, to laymen, of complex legal concepts. This is evidence, of a speech filtered through an imperfect

understanding and resting on the chance use of words by a hurried news reporter taking longhand notes.

There is no evidence which "rationally justifies" the findings. The court below failed to make its own appraisal of the evidence and to apply the requisite standard of proof—viz. clear and convincing. The offense of bringing disrespect on the courts is narrowly defined to preserve the independence of the bar. It encompasses only utterances which threaten the person or reputation of the judge, or charge him with knowing abuse of his powers, or accuse him of political or corrupt motivation. The facts do not make out such an offense here. As applied here, the offense found against petitioner is an obstruction to the independence of the bar.

2. The discipline imposed abridges freedom of expression. If the Honokaa speech had been given by a layman, there would be no question of its protection under the rule of *Bridges v. California*, *Pennekamp v. Florida* and *Craig v. Harney*. The court below sanctioned a proscription upon this utterance solely for the reason that it had been made by a lawyer of record during the pendency of his case. Its holding is incompatible with informed discussion of important social issues. Pending cases often raise serious questions that can be most meaningfully discussed while the case is pending and most helpfully discussed by the lawyer of record. The lower court's concepts that the courtroom is the only forum in which the lawyer may "vindicate his clients" and that "the judicial process is entitled to protection from those who get their license from a judicial temple" misconceives the purpose of public discussion and its value in a free society. They also posit an obligation of "loyalty" toward courts which undermines effective

advocacy. Aside from the limitation imposed on all citizens under the rule of Bridges, Pennekamp and Craig, the utterances of the lawyer of record would seem to be qualified only by his duty not to bring the courts into disrespect. In this area, the cases forbid speech which (a) threatens the person or reputation of the judges, (b) charges him with wilful abuse of his authority, or (c) lays against him corrupt or political motivation or conduct. The utterances here fall far short of this. These limitations operate on the basis of the lawyer's relation to the court, not to a pending case. Research discloses no decisions forbidding or restricting lawyers' speech about pending matters in which they are of record, on that ground. The facts of this case do not necessitate the fashioning of any other limitation on the lawyer's freedom of speech. Any restriction based on the pendency of the case would foreclose informed comment on current matters of great social value.

The court below rejected the clear and present danger test. It utilized no method of balancing the interest in public confidence in and respect for the courts against the interest in informed and meaningful public discussion concerning important issues. It failed to specify the nature of the "restraints" it felt to be applicable only to lawyers or to indicate the circumstances in which they would be operative. Its standard of "unseemly" has been often rejected by this Court and is censorial.

On balance it would seem that the speech here should be entitled to First Amendment protection. It was generalized discussion, not an attack specifically levelled at a judge. The grievances she raised were real; certain of them had troubled bench and bar for many years and others presented problems that finally reached this Court.

of misunderstanding and distortion must be fully understood. Petitioner, perhaps rashly, undertook to explain to laymen the complex and difficult nature of a conspiracy prosecution and the evidentiary problems it creates. Lawyers and judges have difficulty with the articulation and application of the rules relating to admission of evidence and vicarious responsibility in conspiracy cases. A layman's recollection of an attempted vulgarization of these concepts must ineluctably be permeated with the untrustworthiness of which Wigmore speaks. (Op cit.) Yet it is upon this version of her speech filtered through the untrained understanding of a lay listener—combined occasionally with the chance use of the pronoun "they" by a hurried news reporter who did not take verbatim notes—that the findings which wreck petitioner's career finally rest. This is indeed an unsubstantial basis for such drastic action. It deserves the characterization "dubious evidence" made by the dissenters below. [R. 599.]

Finally it must be said that, taking them on their face, the remarks as found below do not constitute an attack upon Judge Wiig or his integrity. Lawyers, and judges, know that horrible and shocking things can and do occur in court rooms without any fault of the judge and without reflecting upon judicial integrity. Witnesses commit perjury. Prosecutors knowingly resort to perjured testimony. Lawyers badger witness and parties give vent to their passions and shout epithets and billingsgate at each other. The oppressive use of the conspiracy charge, the employment of professional informers and witnesses with their questionable veracity, the government's use of the anti-communist propaganda machine while invoking the machinery of a jury trial for Communist defendants, might well impress more than the participants in the *Fujimoto* trial as "horrible and shocking." And this,

The finding of attack on the judge rests upon implication from most uncertain evidence, particularly because the laymen's version of petitioner's speech represents imperfect recollection strained through necessarily incomplete understanding of a lawyer's exposition of technical legal concepts. In addition the notes are not a verbatim account but elliptical longhand note-taking and to place a gloss on such words so as to derive from them an attack upon the judge is to rest an inference upon an inference which in turn has no identifiable basis. Most of what petitioner said in her speech she had already presented to the court in motion papers. The speech was given to an audience almost wholly consisting of contributors to the defense she was conducting, and there is no evidence that petitioner sought publicity for her remarks. Petitioner's unblemished and distinguished record, plus her then position as one of defense counsel daily before Judge Wiig, negative any intent or purpose to impugn his integrity.

The things said and the circumstances of their utterance show no immediate threat to the dignity or public respect of the bench. We deal here with objective standards not subjective reactions. The Court will assume that the public will weigh all information about its judges and not be led off by a single utterance, especially where it lacks any direct impact upon or incitation against the judge or the judiciary.

The First Amendment standards employed by the lower courts have a serious effect on lawyer's advocacy. Lawyers must be free to criticize courts both to their face and publicly. Infringement in either area operates in both.

3. The interview of the juror was not gross misconduct and to hold it to be such undermines the ability

of the bar to protect clients and courts from tainted verdicts. Petitioner interviewed the juror after verdict and at the request of his sister and with the approval of his wife. Before doing so petitioner had been told that he had been acting irrationally and speaking of wrong doing and frame-up in connection with the case. The interviews were proper to ascertain whether the verdict was affected by the irrationality of the juror during the trial and whether there had been wrongdoing. This was not an effort to impeach a verdict by getting information concerning the jurors' thought processes. This is a case covered by early decisions of this Court sanctioning interrogation of the juror to ascertain "overt acts" which taint the verdict. The authorities cited by the Territorial Court and a prior holding of the court below are inapplicable because they involve interrogation merely with reference to jurors' reasoning processes in reaching their verdict. This aspect of the case involves the supervisory functions of this Court as respects a rule now applicable in at least two circuits.

4. The judgment of the Territorial Court, affirmed below, was beyond its jurisdiction. The federal court was the only court having jurisdiction. The Honokaa speech was delivered by petitioner while she was counsel of record in a case in the federal court. The quality of her conduct turned upon her relation to that court and the impact of her speech upon that court and the case at trial there. The juror interview was also conducted by petitioner as a practitioner in a federal court in respect of a juror

findings necessary to support the judgment of the Territorial Court had to rest upon a solidity of evidence that took into account the entire speech, the context of the assertedly offensive language and the fair meaning which reasonable minds having petitioner's familiarity with legal procedures would give to the words used, and it was for the court below to make its own evaluation of the evidence. *Bridges v. California,* 314 U. S. 252; *Pennekamp v. Florida,* 328 U. S. 331; *Craig v. Harney,* 331 U. S. 367. This Court will search the evidence to see that "no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings screening reality." *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.,* 312 U. S. 287, 293. The claim of deprivation of due process requires the same ransacking of the record. *Schware, Konigsberg, supra; Norris v. Alabama,* 294 U. S. 587. As a lawyer's discipline case the standard of proof was "clear and convincing," free from doubt,[29] and this standard necessitates similar reappraisal of the evidence on appeal. Compare *Schneiderman v. United States,* 320 U. S. 118, 122; *Knauer v. United States,* 328 U. S. 654, 658; *United States v. Bridges* (D. C. Cal.), 133 Fed. Supp. 638, 641, n. 5.

The lawyer's license, resting as it does upon the solemn judicial act of admission to practice at the court's bar (itself akin to a judgment) together with the oft-expressed concern of the court for the preservation of the lawyer's professional independence and freedom of speech, invokes, we submit, standards of proof and appellate review similar to those applicable in cases of

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[29]This is the rule of the Territorial Court (*In re Trask,* 30 Haw. 736, 740), and it is the universal view. Drinker, *Legal Ethics,* 1953, Columbia Univ. Press, p. 46.

of that court and connected with a matter pending in that court. The Territorial Court laid down rules of conduct for federal practitioners in cases pending in the federal court. This intimately affects the administration of justice in the federal court. This is not the kind of case where the lawyer commits an offense such as stealing, where the nature of the offense is established, all jurisdictions condemn it and the only issue is whether it was done. The very quality of the conduct for disciplinary purposes turns on the relation of the lawyer and his acts to the court wherein he was practicing at the time and its effect in the matter pending there. This is a question of reserving to the federal court the management of its own affairs in matters which derive their significance from the close relationship of the attorney's conduct to the administration of justice.

Given the special circumstances here and the federal constitutional rights involved, the only sound approach would have been to have this matter determined in the federal jurisdiction. There it would have been better insulated from local pressures and influences.

If by federal standards petitioner had been disciplined in the federal courts, then it would have been appropriate for the Territorial Court to act. This is the true meaning of *In re Isserman,* relied upon by both lower courts.

ARGUMENT.

POINT ONE.

The Findings of the Territorial Court, Affirmed Below, That Petitioner's Honokaa Speech Was a "Wilful Oral Attack Upon the Administration of Justice . . . in the . . . District Court" and "by Direct Statement and Implication Impugned the Judge" Are so Arbitrary as to Offend Due Process.

In assaying this record concerning the Honokaa speech it is essential to observe both the thing to be proved and the evidence used. The thing to be proved is a series of verbal utterances made at a public meeting almost two years before the disciplinary proceedings began. There is no question that the speech was extemporaneous [R. 24, 25, 179], and no verbatim record ever existed. The evidence used to prove these utterances consists of (a) the testimony of eight witnesses to what they could recall having heard some two years before and (b) the nearly contemporaneous notes of Matsuoka [R. 753 ff.] and the equally contemporaneous report of petitioner to Judge Wiig. [R. 578 ff.] The testimony of the eight witnesses,[20] summarized in our statement of the case, *ante,* was fragmentary in the extreme. Often extracted by prodding and leading questions, it is confined only to the remarks charged in the complaint. No attempt was made to elicit from these witnesses the full speech or the context of any particular remark. Nor was there any effort to develop petitioner's statements with any precision.

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[20]Matsuoka [R. 145 ff.], John D. Morse [R. 164 ff.] Olival [R. 171 ff.], Ferreira [R. 162 ff.], Crabb [R. 182 ff.], Phyllis Morse [R. 184 ff.], Ramos [R. 178 ff.], Andrade [R. 180 ff.].

denaturalization and what Judge Goodman describes in the *Bridges* case, *supra,* as "claims which have serious social consequences or harsh or far reaching effects on individuals." As to this Court's recognition of solicitude for the harsh and far reaching effects of disbarment, see *Bradley v. Fisher,* 13 Wall. 335, 355.

The standards of proof imposed by these considerations cannot be satisfied by equivocal evidence. Absent the unsupported gloss placed upon "they" by the court below each of the remarks found can reasonably be read as not pertaining to the judge. In their context these remarks cannot rationally be read as referring to the judge at all. Where an utterance can be reasonably read as having an innocent meaning the imperatives of the First Amendment deprive it of probative force for guilt. *Schneiderman v. United States,* 320 U. S. 118, 157-159; *Baumgartner v. United States,* 322 U. S. 665, 674, 675; *Hartzel v. United States,* 322 U. S. 680, 687-690; see also *Fiske v. Kansas,* 274 U. S. 380.

The arbitrariness of the fact finding menaces a grave abridgment of professional independence. The "gross misconduct" found by the two lower courts is that which the American decisions usually define as failing to maintain the respect due the courts.[29a] But the need that the "independence of the bar" be "scrupulously guarded" (*Ex parte Secombe,* 19 How. 9, 13) has dictated that the offense be narrowly drawn. The test is whether the lawyer's utterance is marked with an enormity inconsistent with the court's ability to maintain public respect or subversive of the proper administration of justice. *Bradley v. Fisher,* 13 Wall. 335, 354. Punishment is not an object.

[29a] American Bar Association Canon Number 1 (A. B. A. Canons of Pro. Ethics, 1957, p. 1) would seem to be a codification of the concept worked out in earlier American decisions, most of which are cited in the next three footnotes.

Ex parte Wall, 107 U. S. 265, 288. The offense encompasses only utterances which threaten the person or reputation of the judge,[30] or charge that he has knowingly misused his powers in a particular case,[31] or claim that the

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[30]*Bradley v. Fisher, supra*, the attorney accosted the judge in a "rude and insulting manner" and threatened him with personal chastisement; *Elliott v. Green*, 7 Colo. 237, 3 Pac. 65, the attorney halted the judge on the street, addressed him in "abusive, insulting and threatening language" concerning his action in a pending matter and threatened to expose him in the newspapers; *In re Collins*, 147 Cal. 8, 81 Pac. 220, attorney made statement to press while matter pending before judge accusing latter of malfeasance and incompetence in office; *Chicago Bar Assn. v. Metzgen*, 291 Ill. 55, 125 N. E. 734, attorney wrote judge after latter set aside divorce decree threatening to sue judge, describing his action as "dastardly" and calling judge "irresponsible political mannikin"; *Johnson v. State*, 152 Ala. 93, 44 So. 671, attorney wrote judge that he should treat attorney as gentleman or attorney would know why and accusing judge of meeting with prosecutor to plan how and why a certain accused would be tried.

[31]*In re Hilton*, 48 Utah 172, 158 Pac. 691, attorney in speech said that in its decision the court had been dominated by fear of the Mormon Church and had committed judicial murder; *State Board v. Hart*, 104 Minn. 88, 116 N. W. 212, the attorney wrote a letter to the Chief Justice of the Supreme Court and released a copy to the press, commenting upon a recent decision of the court, saying that it had assigned the property involved to one who had no better right to it than a burglar, that this was like robbing a widow, that the court had acted as a "fence," that the court either had emasculated intelligence or constipation of morals or faithlessness to duty, that the court was either unlearned in the law or not honest; *In re Humphrey*, 174 Cal. 290, 163 Pac. 60, attorney issued an election pamphlet attacking a judge for the handling of two cases in which he said, *inter alia*, that the judge had used his powers to enable a bank to keep money that another was entitled to; *State v. Breckenridge*, 126 Okla. 86, 258 Pac. 744, the attorney wrote a newspaper article referring to recent action of the Supreme Court of Oklahoma in which he stated erroneously that the Supreme Court had suspended the writ of habeas corpus, had an interest in the outcome of the case, and acted like a star chamber; *Wilhelm's Case*, 269 Pa. 416, 112 Atl. 561, during the pendency of a disbarment proceeding against another lawyer, the attorney made an "impassioned" speech saying that the disbarment proceeding was a conspiracy to crucify that lawyer and urging political action to prevent it; *In re Breen*, 30 Nev. 164, 93 Pac. 997, commenting upon a decision of the Supreme Court of the state reversing a murder conviction, the trial judge said that the opinion of the Supreme Court was an abnormal document, that it was either reprehensible or

The treachery of such evidence as proof of verbal utterances, as well as the need for the most careful proof which sets out the utterance as a whole with full context and sedulous precision, has long been recognized. As Wigmore has it,

> ". . . verbal utterances differ from other acts or events in an important way, which calls for special caution in evidencing them . . . . Verbal utterances are attempts to express ideas in words. The more complicated the idea, the more elaborate is the structure of the verbal utterance. . . . . It follows that the thought as a whole, and as it actually existed, cannot be ascertained without *taking the utterance as a whole* and composing the successive elements and their mutual relations. To look at a part alone would be to obtain a false notion of the thought . . . the great possibilities of error in trusting to recollection—testimony of oral utterances, supposed to have been heard, have never been ignored . . . Entirety of parts is thus as essential as verbal precision; for the greatest possibilities of error lie in trusting to a fragment of an utterance without knowing what the remainder was." *Evidence* (3rd ed. 1940), Vol. 7, Section 2094, pp. 476-477, (Emhasis in original.)

The evidence which comes closest to meeting these standards is the Matsuoka notes and petitioner's report to Judge Wiig. Each corroborates the other on the general subject matter and tenor of the speech. To avoid completely even the appearance of basis for the observation in the majority opinion below that petitioner's case rests upon a deft interweaving of her "versions of the testimony into the bar association's evidence pointing the other way" [R. 561], the analysis which follows rests upon the version reflected in the Matsuoka's notes. In

doing this we seek to take the evidence most strongly against petitioner.

But this is not to overlook a serious caveat arising from the origin of this evidence. Matsuoka originally took his notes in longhand preparatory to writing his news article. [R. 152, 153.] Those received in evidence [R. 573 ff] are not his original notes,[21] but a slightly "expanded" version typed up at the request of his editor after the news accounts of the speech had led to the "to-do" in Judge Wiig's court. [R. 159, 160, 153.] To some extent therefore, this evidence is a product of interpretation of the speech itself—interpretation necessarily resulting from the process of selection imposed on anyone who takes longhand notes of a speech as well as from the efforts of a layman to render the complex subject matter petitioner dealt with. And this interpretation was prepared in its present form at a time when the "to-do" in court made it advisable to have reporter's notes confirmatory of the news story—the notes came *post litem motam,* as it were. Given these limitations, inferences drawn from the notes which involve further interpretation as to meaning may well be unreliable.

The majority opinion below, in marked contrast to the dissent, evinces no search for reliable evidence of petitioner's remarks. Although it took cognizance of the existence of the Matsuoka notes [R. 561] and appended them to its opinion [R. 573 ff.], the majority appears to have relied on a newspaper account of the incident written by Matsuoka. [R. 560, 561.] A comparison of the

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[21]These he gave to representatives of the F.B.I. [R. 154, 155.] In response to petitioner's strenuous efforts to have them produced [R. 157, 174] it was reported at the hearing that the F.B.I. did not have them. [R. 289, 290.] Nor did the newspaper editor have them. [R. 289.]

less on their face and demonstrably innocent in context have been inflated into offensive conduct. By this means the offense of bringing the courts into public disrespect has

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rights; *In re Troy*, 43 R. I. 279, 111 Atl. 723, the attorney made a speech during a Democratic campaign rally in which he asserted that judgeships on the Supreme Court of the state are "a matter of barter" and "are bought and sold" and asking "who paid money, how much was paid and who got the money at the election of the last Supreme Court judge"; *State Board v. Spriggs*, 61 Wyo. 70, 155 P. 2d 285, in an election pamphlet an attorney spoke of the "horrible and unbelievable breakdown of justice in the Supreme Court," conduct on the part of judges that "drives justice from its own temple to the habitations of bias, prejudice, failure and incompetency" and charged the judges with incompetency and corruption; *In re Bevans*, 225 App. Div. 427, 233 N. Y. Supp. 439, in a complaint filed in an action the attorney included allegations that judges and others had engaged in an illegal combine to commit crimes, protect criminals and ruin those who opposed them; *Lewis County Bar Association v. Willis*, 95 Wash. 251, 163 Pac. 737, the attorney issued a pamphlet entitled "The Crimes and Misdemeanors of Hon. Alonzo E. Rice." This pamphlet charged Judge Rice with grand and petit larceny, malfeasance and graft, adding that his court was a school for scandal. The pamphlet charged the judge with many specific crimes and wrongful acts; *In re Egan*, 24 S. D. 301, 123 N. W. 478, the attorney through newspaper articles repeatedly charged corruption on the part of the Supreme Court and the use of political influence with its members; *In re Thatcher*, 80 Ohio 492, 89 N. E. 39, the attorney in a series of newspaper articles charged the judge with bias against plaintiffs and in favor of corporations in personal injury cases, with collusion with the employer attorneys in labor cases, with capricious judicial action in cases decided by him and with taking unlawful salary; *Cobb v. United States* (9 Cir.), 172 Fed. 641, the attorney in a letter to the press said that the court had acted in the interest of the "gang whose sinister influence has paralyzed" the judge "for the past two years"; *United States v. Green* (C. C., Colo.), 85 Fed. 857, in an appellate brief the attorney uttered a "false, scandalous and malicious libel upon two of the presiding judges." In the brief this libel attacked their integrity although the precise language is not reported; *Thatcher v. United States* (6 Cir.), 212 Fed. 801, this case rests on the same facts as *In re Thatcher, supra*; *In re Richeson*, 64 Ariz. 85, 166 P. 2d 583, the attorney in papers filed in a case attacked the honesty, integrity and motives of individual members of the bar and made "groundless charges . . . against the judges of the Federal courts," apparently attacking their integrity although the precise language is not given in the report. The court found that the conduct indicated "mental instability and lack of moral values"; *Bar Association v. Philbrook*, 35 Cal. App. 460, 170 Pac. 440, an attorney in an affidavit filed in a pending action used

news story with the notes shows that in the former the reporter had, naturally enough, selected material, highlighted certain aspects and quoted the litigated remarks out of context. Aside from the fact that the article as such is hearsay, as interpretation rather than straight reporting it fails to measure up to the standard formulated by Wigmore. It is to be noted that there is no testimony that the news story truly sets forth petitioner's speech. [R. 148.]

By a curious inversion of what we understand to be the usual reasoning processes in these matters, the majority quotes the news story because the "findings of both the [Legal Ethics] committee and the [Territorial] Supreme Court implicitly sustain the accuracy of the published item." We had thought that, in the normal course, findings and judgments were sustained because supported by evidence of a substantial character—not because they sustain the evidence. Moreover, in cases of this kind where the standard of proof is clear and convincing (see *infra*) we had thought that "implicit" support is not enough, that the evidence had to be clear, direct, free from doubt.

The majority opinion, again in marked contrast to the dissent, makes no examination of the speech as a whole, no appraisal of the critical passages in their context. The findings of the majority below, as those of the Territorial Court, rest upon isolated sections only. This process of isolation accompanied with a glossing of the evidence serves to give a meaning and thrust to the critical remarks which the evidence does not support.

In our statement of the case, *ante*, we have summarized Matsuoka's notes and have italicized verbatim the portion bearing on the findings so as readily to give their con-

text. The words in capital letters indicate the objects of petitioner's criticism. Proper contextual appraisal of the critical remarks requires, we suggest, *first* the ascertainment of the general burden or direction of the speech as a whole, and *second*, the immediate setting of the critical remarks themselves. We address ourselves to the first approach. At the outset we say, notwithstanding the observation of the majority below [R. 561, 562] that the speech did indeed refer to the *Fujimoto* trial before Judge Wiig. It was critical of that trial in many respects, most of which were applicable not only to that trial but to any Smith Act trial, whether, as one witness put it "in Honolulu, New York or whatever." [R. 167.] Petitioner's main points were that the trial was essentially a thought control or book reading trial (see summary items 3, 11, 18, 19, 20), that as a conspiracy trial it was unjust because it was predicated upon an agreement to do something, not the doing of it (items 4, 7, 11) and because it permitted great latitude in the admission of prejudicial and remote evidence (items 6, 8, 9, 11, 15, 17), that the government's pre-trial propaganda and methods of recruiting witnesses make a fair trial impossible. (Items 7, 9, 10, 12, 13.) A review of the words in capitals show that she was speaking of "men in power" (item 3), "government" (items 4, 7, 10, 11, 12, 17), "F.B.I. agents" (items 5, 13), government witnesses Crouch and Johnson (items 6, 8, 11, 15), "they" (items 9, 16). In all of this there is no specific mention of Judge Wiig or the District Court. Once there is a reference to a "federal judge" who admitted Crouch's testimony of events 27 years old in comparison to the exclusion of such remote hearsay in prosecutions for substantive offenses as in the *Palakiko-Majors* case. (See item 15.) But this reference casts no reflection on Judge Wiig or his court and is blameless.

We turn now to an examination of the critical remarks in their textual setting. They are quoted here in the language of the court below. [R. 561.]

(1) "That horrible and shocking things were going on at the current Smith Act trial in Honolulu." According to the Matsuoka notes [R. 574] she said at the beginning of her speech that she "wanted to tell about some rather horrible and shocking things that go on at the trial." This is obviously an introductory remark by way of preface to the speech as a whole.[22] It takes on meaning only from all that followed it. That which followed attributed no horrible and shocking thing to Judge Wiig. The specifics charged in the balance of the speech are laid at the door of government agents (their tactics of prosecution, their methods of recruiting witnesses, their "propaganda," their use of obviously unreliable witnesses) and upon the Smith Act as a weapon of thought control. In her criticism that the conspiracy theory was being abused, petitioner had persuasive and learned company.[23] Her attack upon the unreliability of govermnent informers such as Crouch, was but part of a rising chorus which finally culminated in drastic action by this Court to pre-

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[22]Note the testimony of Andrade ". . . she said she would like to tell the audience of the horrible and shocking things that went on in the Smith Act trial in Honolulu. *and she also gave several illustrations*, but . . . I cannot remember them. . . ." [R. 180, 181; emphasis added.] Also Mrs. Morse: ". . . she gave various examples of things that I don't recall that were going on, in what she called the horrifying, shocking trial." [R. 185.]

[23]See Chief Justice Taft and the Senior Circuit Judges, Annual Report of the Attorney General, 1925, pp. 5-6; Justice Jackson concurring in *Krulewitch v. United States*, 336 U. S. 440, 453; Judge Learned Hand in *United States v. Falcone* (2 Cir.), 109 F. 2d 579, 581. See also Lasky, *The Long Bow of Lucretius, Book IV*, Line 817, 43 Cal. L. Rev. 596.

serve the purity of the judicial process.[24] To paraphrase to a lay audience these two abuses as "horrible and shocking" would not be a distortion of the judicial comment just referred to. And, let it be remembered, neither these nor any other comment in petitioner's speech attacked the integrity of Judge Wiig.

(2) "That the trial was not a fair one." [R. 561.][25]

(3) "That 'they' just made up the rules as 'they' went along." [R. 561.][26]

We treat with these together because in the evidence they are successive sentences. According to the notes, petitioner at one point said "there's no such thing as *a* fair trial in *a* Smith Act case." [R. 577; emphasis added.] This is immediately followed by "all rules of evidence have to be scrapped or the government can't make a case." [R. 577.] The context of these two sentences indicates that the first followed comments that "they" use unreliable testimony because "they will do anything and everything to convict" [R. 576; our item 9], that the government has witnesses "say things in order to convict" [R. 576; our item 10], that such evidence as the Johnson testimony was remote and used

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[24]Claims that this witness had a long history of perjured testimony in Smith Act and related prosecutions went unchallenged by the Government, in *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115, 121, 124. For another instance of the use of an obviously unreliable witness in a Smith Act case see *Mesarosh v. United States*, 352 U. S. 1; *Flynn v. United States*, 130 Fed. Supp. 413. Compare *Jencks v. United States*, 353 U. S. 657.

[25]Petitioner told Judge Wiig that she had said "there is no such thing as a fair trial in a Smith Act case"; that she had explained this on the basis of books and ideas being on trial and the hysteria created by Government propaganda. [R. 578, 579.]

[26]Petitioner unequivocally denied having made this statement. [R. 582.]

much as comment upon his conduct.[33] The gist of petitioner's speech was a criticism of the *Fujimoto* trial because it was a thought control trial; because as a conspiracy trial it was aimed at a claimed agreement to do a thing, not the doing of it, and it permitted too broad a scope for the admission of evidence; and because Government propaganda before trial and its methods of recruiting and using witnesses made a fair trial impossible. These comments touched upon matters which also became the subject of general notice,[34] as well as judicial examination.[35] In contrast to the cited cases, then, we deal here with discussion on a generalized plane and with no thrust at the trial judge.

It is in this context that the importance of discussion while the case is pending can be properly assessed. Pending cases, as the *Fujimoto* case, often present questions of broad concern dealing with the wisdom and effectiveness of existing law, the practices of law enforcement agencies and the administration of law and justice. It is a truism that discussion of these matters is likely to reach a wider and more responsive audience while the case is actually going on. *Bridges*, 314 U. S. at 268-270; *Pennekamp*, 326 U. S. at 346. Those best fitted to contribute

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[33]Save of course for the wholly blameless reference to the ruling by "a federal judge" who admitted evidence of third party declarations in the *Fujimoto* conspiracy trial as contrasted with the exclusion of such evidence in some other non-conspiracy case.

[34]See, *e.g.* 62 Harvard L. Rev. 276 (1948), The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants.

[35]*Communist Party v. SACB*, 351 U. S. 115; *Masarosh v. United States*, 352 U. S. 1; *Jencks v. United States*, 353 U. S. 657.

merely as a handle to introduce a number of books [R. 576; our item 11], that the government has carried on a propaganda barrage so that hysteria about communism infects the jury [R. 576; our item 12], that the F.B.I. pressures people to testify as it wants. [R. 577; our item 13.] It is this context that gives meaning to the statement that "there is no such thing as a fair trial in a Smith Act case." And this involves no charge at all against the integrity of Judge Wiig.

The last quoted sentence was followed by the one referring to the scrapping of evidence. The evidence has this remark as "all rules of evidence have to be scrapped or the government can't make a case."[27] [R. 577.] The court below made no finding that this remark was made, and it may be that the omission was intended as a finding that it was not made. [See R. 561.] The Territorial Court made a finding that petitioner said that "all rules of evidence *were being* scrapped so the government could make its case." [R. 117; emphasis added.] This version distorts the evidence so as to make the remark apply only to the *Fujimoto* trial and to give it a thrust as an act to aid the government. But in its true wording and in context it is plainly a comment on Smith Act trials generally, including, of course, the one in Honolulu. In the very preceding sentence she spoke of the lack of "a fair trial in *a* Smith Act case." The sentence is followed by a discussion of the difference in the rules of admissibility in trials for the substantive offense (*Palakiko-Majors* case) and for conspiracy. Later this is followed by a discussion of the latitude allowed by Judge Medina in an earlier case and the efforts by the Govern-

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[27] Petitioner unequivocally denied having made this statement. [R. 582.]

ment to go farther afield, "everything including the kitchen sink." [R. 577.] This finds an echo in an earlier part of the speech when petitioner criticized the admission of Crouch's testimony about "Russia in 1927," when "Fujimoto was four years old" and "Jack Hall was thirteen." [R. 575.] Plainly, this is a comment on the rules of evidence in conspiracy cases, not an attack upon Judge Wiig. It is true that in the passage discussing the *Palakiko-Majors* case appear the words "with the same situation a federal judge sitting on a federal bench permits Crouch to testify about 27 years ago." We read this as a report of something done at the trial, as an example of how the rules of evidence operate in conspiracy trials It may be critical of Judge Wiig's exercise of the discretion allowed him by the rules, but it does not charge him with wrongdoing or lack of integrity. It simply explains the results of the application of rules of law in the case at hand.

Shortly following the two sentences just analyzed there appear these, "there's no fair trial in the case. They just make up the rules as they go along." [R. 577.] These two sentences have the same context as those just reviewed. But these come between the passage discussing the *Palakiko-Majors* case and that discussing the experience in the trial before Judge Medina. This makes it clearer that petitioner's remark was addressed to the operation of the rules of evidence in conspiracy cases and the pressure by the Government to expand the scope of admissibility.

In these sentences the pronoun "they" has become all important. The majority below put quotes around it and this seems to have given it a gloss to include the trial judge. Such a construction is not supported by the evi-

to such discussion are lawyers, and the one of these most moved to present grievances and expound them thoroughly is a lawyer in the case. Plainly comment and debate in these areas may well, if not inevitably, include criticism, not simply of the law or the law enforcers, but also of the judge presiding over the pending case. Where the burden of the criticism is that the accused are being treated unfairly this may embrace either judicial conduct which is claimed to be erroneous or which is asserted to have produced an unfair result by virtue of its faithful adherence to established rules.[36] If the unfairness is claimed to have advantaged one side of the litigation the comment is susceptible of interpretation as charging partiality. But comments of this nature touch upon the very heart of judicial administration and they require public attention and understanding, the more so when the substance of the criticism is that in adhering to existing rules, the judge has brought about an unfair result. Moreover, the greater the notice which pending cases attract the greater the service performed by comment during the judicial proceedings. Such cases in themselves often raise issues of greater societal concern, and the public notice they receive gives assurance of more meaningful discussions of comment or criticism offered by the lawyer of record. It would appear, therefore, that discussion such as that involved here has a high degree of social importance. Furthermore, because such comment almost inevitably encompasses, directly or indirectly, the

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[36]This would seem especially true where, as here, much of what petitioner said was an attempt to put in layman's terms the contentions urged by motions and arguments to the trial judge. Thus the effect of government created hysteria had been presented in a motion for change of venue [R. 579], the abuse of conspiracy prosecutions and the consequent latitude in the admission of evidence in other briefs and memoranda. [R. 580, 582.]

dence. As the passage continues we find the nouns "attorneys," "Government." [R. 577.] Plainly the pronoun "they" in the sentence under examination refers to the attorneys—Government attorneys. It is familiar usage to refer to the prosecutors as the Government. Of the six witnesses who testified about a remark similar to this, four [Ferreira, R. 163; John D. Morse, R. 165; Andrade, R. 181; Phyllis Morse, R. 185] said petitioner spoke of the Government, and two [Matsuoka, R. 151; Olival, R. 171] used the pronoun "they." Andrade recalled the remark about "the Government—I mean, they" making up the rules in the same context with the reference to *Palakiko-Majors:* [R. 163.] The witness, John D. Morse, it will be recalled, said that petitioner said "there was not such a thing as a fair trial in a Smith Act case" and this "tied in with any Smith Act case, whether in Honolulu, New York or whatever it was." [R. 167.] Matsuoka said that "a portion" of the speech was "a general criticism as to the character of the criminal proceedings brought under the Smith Act." [R. 161.] In these lights to read "they" as referring to Judge Wiig violates not only good grammar but sound reasoning.

(4) "That unless the Smith Act trial at Honolulu was stopped in its tracks there would be a new crime—people will be charged with knowing what is included in books." [R. 561.] This is virtually a direct quotation from the notes [R. 577] which are the only evidence of this remark. It was made in the context of observations about another Smith Act trial and the dangers of thought control and censorship—the "new crime" obviously being reading books and speaking publicly. The remark on its face has no application to Judge Wiig and no evidence was offered to place such a gloss on it.

Whatever could have been meant by the remark about stopping the trial in its tracks, this could obviously have no reference to Judge Wiig. A fair reading of the statement would attribute to petitioner some such meaning as getting an acquittal by directed verdict or otherwise, or reversing the case on appeal[28] or in some other way resisting and defeating the Government's efforts to prosecute people under a law which petitioner regarded as unfair because it employed the dragnet of conspiracy and was predicated upon books and thoughts. In any event, the actual object of her remark was the threat of the "new crime" of reading books.

It is significant that petitioner recalled words similar to these. In her statement to Judge Wiig she said "I said that if Smith Act prosecutions continue, the only safe thing will be not to know how to read. And that Smith Act prosecutions, unless stopped, will lead to thought control. I said further that the Smith Act can be stopped here in Hawaii if enough people began to understand the danger of such prosecution." [R. 581, 582.] This statement was given two days after the speech at Honokaa and before Matsuoka's notes had been typed up. [R. 152.] It closely corroborates, and is closely corroborated by, the Matsuoka notes. From this it seems only fair to conclude that petitioner was seeking to promote the end of Smith Act prosecutions by spreading enlightenment as to what she conceived to be their dangers to the democratic process. In none of this can there be found the semblance of an attack upon Judge Wiig.

As respects the evidence as a whole, the nature of petitioner's subject matter and the consequent likelihood

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[28]The convictions were later reversed (*Fujimoto v. United States* (9 Cir.), 251 F. 2d 342) upon authority of this Court's decision in *Yates v. United States*, 354 U. S. 298. Petitioner was counsel of record on the appeal.

without casting any reflection upon the court or Judge Wiig. Indeed the remark is consistent with the premise that Judge Wiig is a fair and honorable man who follows the law but that the law itself produces a result which is "horrible and shocking." In this sense the result directly flowed from Judge Wiig's full performance of his judicial responsibility. That she said "the trial was not a fair one" in and of itself is not an attack upon the court or judge conducting the trial. The unfairness of a trial may result from many things beyond the judge's control, such as the climate of opinion in the vicinage, the use of perjurious witnesses by the prosecutor or the misconduct of counsel or witnesses in the courtroom. If the remark about making up the rules as "they" go along be read as referring to the judge, it is not an attack on his integrity. It simply means that he is not following the law. Lawyers often speak that way of trial judges, and they mean to connote erroneous, not dishonest, judicial action. The remark about stopping the trial has no thrust against Judge Wiig. There was not even supporting evidence to permit such an interpretation of it.

Arbitrary fact finding based upon no evidence or drawing inferences that the law or good sense and experience forbid, offends due process. There must be evidence that "rationally justifies" the findings. *Schware v. Board of Bar Examiners,* 353 U. S. 232, 239, 247; *Konigsberg v. State Bar,* 353 U. S. 252, 273; *Wieman v. Updegraf,* 344 U. S. 183, 191, 192; *Slochower v. Board of Education,* 350 U. S. 551. See also *Morrisette v. United States,* 342 U. S. 246; *Maggio v. Zeitz,* 333 U. S. 56; *Mortensen v. United States,* 322 U. S. 369.

The court below failed to discharge the responsibility cast upon it by the applicable principles of appellate review. Because of the free speech problems here the

judge is corruptly or politically motivated.[32]

Plainly petitioner's statement as shown in the evidence do not meet these criteria. Statements which are blame-

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pitiable, and that it was not supported in fact or in law; *Duke v. Committee on Grievances* (C. A., D. C.), 82 F. 2d 890, the attorney filed with the appellate court a motion charging that the trial court had filed a false bill of exceptions, that this had been done "intentionally and deliberately," and after the appellate court had refused to correct the bill of exceptions and after disciplinary proceedings had been started against him, the attorney said that the appellate court was as badly involved in falsifying the bill of exceptions as the trial judge, adding that the matter involved questions of the judicial integrity and common honesty of six federal judges; *In re Chopak* (D. C., N. Y.), 66 Fed. Supp. 265, during the pendency of the case the attorney wrote the judge accusing him of acting "despotically" and of deliberately taking advantage of his office to rule with "passion and vehemence." He also wrote his client saying that the judge was prejudiced against the client because the latter was a Negro; *In re Graves*, 64 Cal. App. 176, 221 Pac. 411, the attorney issued a public circular accusing the judge of using the "slightest flaw" to set aside a judgment against a railroad and of misusing his office so as to pry into the secrets of the juries' deliberations; *Morrison v. Snow*, 26 Utah 247, 72 Pac. 924, and *In re Snow*, 27 Utah 265, 75 Pac. 741, these are related cases. In the former the attorney filed an answer to a complaint in a civil case alleging that the judge conspired with the plaintiff to bring the suit and used the weight of his judicial position to that end, and that the suit had been brought to satisfy the malicious instincts of the judge so that the fruits of it should be divided between the judge and the plaintiff. In the second case he was suspended after a hearing for having filed such a pleading; *In re Dunn*, 85 Nebr. 606, 124 N. W. 120, in a petition for rehearing the attorney attacked the judge who wrote the Supreme Court's opinion, accusing him of "rank incompetence," of not knowing the plaintiff's complaint, of using reasoning that "reduces the law to a farce," of misstating the evidence, of ignoring the evidence supporting the defendant's position, and of dispensing with the evidence so as to base his conclusions on mere conjecture; *State v. Kirby*, 36 S. D. 188, 154 N. W. 284, the attorney issued a statement to the press saying that the Supreme Court would not disbar another lawyer whose disciplinary case was then pending, because that lawyer planned to run for public office and the Supreme Court and the Governor of the state did not want that lawyer to use a decision of the Supreme Court in a third case for political purposes in a forthcoming campaign.

[32]*State Bar Commission v. Sullivan*, 35 Okla. 745, 131 Pac. 703, the attorney caused to be printed and published a pamphlet entitled "A Criminal Combine," in which he accused a judge of participating in a criminal combination to deprive the attorney of his

been expanded to the point that it is without contour and dimension. Construed and applied as here it becomes a trap for the unwary, a dragnet operating by no known or

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the following language in referring to judges of the court: "criminal, corrupt and wicked conspiracy," "calculated brutality," "corrupt deadfall"; *In re Rogers*, 28 N. M. 375, 212 Pac. 1034, the attorney wrote a letter to the judge saying that if ten per cent of the reports about him were true, he was a "blockhead" and the "most corrupt man . . . ever elevated to judicial position"; *In re Robinson*, 48 Wash. 153, 92 Pac. 929, in petition for rehearing to Supreme Court, the attorney stated that it had been rumored how the Court would vote in the case, that the estate involved therein would go one-half to the political ring under whose influence the members of the court were appointed, that the head of this ring could control federal patronage and had already decided to appoint members to federal courts in the area, and that it was the duty of the court to hear the appeal on its merits in order to wipe out these rumors; *In re Philbrook*, 105 Cal. 471, 38 Pac. 884, attorney filed brief with Supreme Court of state charging that one of the justices thereof, while a practicing lawyer, had participated in the preparation of a settlement agreement disposing of many issues of the case and that this agreement, if not set aside, would cause people to know that the court was corrupt. The attorney also charged that a conspiracy existed to have that agreement approved because of the power of the justice referred to and the attorney referred to him as "corrupt," "wicked" and "*particeps criminis*"; *People v. Green*, 9 Colo. 506, 13 Pac. 514, the attorney alleged in pleadings that the judge had accepted a bribe for rendering an unwarranted judgment and that he and the bribing attorney had induced a witness before the grand jury to commit perjury; *In re Mains*, 121 Mich. 603, 80 N. W. 714, the attorney in an affidavit charged the judge with "outrageous, persistent, continued illegal and unlawful rulings," with accepting bribes, with cooperating with attorneys in a "diabolical plot" which was "a malicious, vindictive, corrupt concoction" to place that attorney's client under arrest and get control of his witnesses; *United States v. Markewich* (D. C., N. Y.), 261 Fed. 537, attorney in public speech following decision by court on discontinuance of a street car line, said that the people have been discriminated against, the traction interest has supreme control of the court and everybody else, the decision was not honestly rendered, that recall would be too mild a remedy and the correct remedy should be the noose or impeachment; *Matter of Knight*, 264 App. Div. 106, 34 N. Y. S. 2d 810, attorney accused various judges who had sat on various issues arising out of complex estate litigation of being "incompetent," "mendacious," "grossly dishonest"; *Kentucky State Bar Assn. v. Lewis*, (Ky.), 282 S. W. 2d 321, attorneys connected with taxpayers' litigation published advertisement and filed affidavit charging corrupt arrangement between presiding judge and political bosses to prevent another judge from sitting on the cases.

ascertainable standards. The "fearless, vigorous and effective" advocacy (*Offutt v. United States,* 348 U. S. 11, 13) which the character of our institutions requires for the protection of individual rights can not flourish under the concept of gross misconduct applied here. It is the duty of the lawyer to stand between his client and the court and, when the facts justify it, to resist and criticize the judge himself. *Gallagher v. Municipal Court,* 31 Cal. 2d 784, 795, 796, 192 P. 2d 905. This, we submit, would include advising the court that the trial is unfair as well as that the court has fashioned rules, unsupported by authority, which advantage an opponent. No mind can so compartmentalize itself that it can utter freely and fearlessly in court things which, when uttered beyond the court's threshold, endanger his professional license. In this area there is no real dividing line. If criticism of the conduct of a trial can lead to discipline because it "tended to . . . create disrespect for the courts" [R. 118] so also could such criticism in the courtroom itself. The public confidence in the fair administration of justice cannot dispense with the lawyer's criticism in either forum.

But the evidence here compels the conclusion that the criticism for which petitioner was disciplined was not animadversions upon the judge but rather attack upon the Department of Justice and certain rules of law. We have already shown (*ante,* p. 34) that the objects of her comments were "men in power," "the government," the F.B.I., witnesses Crouch and Johnson, the abuse of the conspiracy theory especially in the admission of third-party declarations, the dangers of thought control. In its essence this is a sharp attack upon the practices of the Department of Justice made in the context of a pending trial. The pendency of the trial seems to have diverted the thinking below from the real object of petitioner's remarks to the

trial judge who was never mentioned. But the hard fact is that the criticism did relate to the Department. Not only is it a truism, as the dissenters below observe, that a lawyer may not "be disbarred for an attack upon the Department of Justice" [R. 604]; to stifle such criticism would so hobble the Department's adversaries as to deprive the administration of justice of two essential ingredients, free criticism and fearless advocacy.

POINT TWO.

The Decision Below Is a Grave Infringement Upon Freedom of Speech in an Area of Great Public Concern, and by a Speaker Peculiarly Fitted to Contribute to Public Understanding.

Had the Honokaa speech been given by a non-lawyer there would be no question as to its constitutional protection. *Bridges v. California,* 314 U. S. 252; *Pennekamp v. Florida,* 328 U. S. 331; *Craig v. Harney,* 331 U. S. 367. Central to the determination below were the facts that (1) the speech was given during the pendency of a trial, (2) by a lawyer of record therein. Neither of these facts should deprive petitioner of her constitutional protection for the speech she actually gave.

1. The cited cases furnish valuable guidance on the importance of public comment during pendency of the case. In those cases there was open public attack upon the judge, either by name or unmistakable reference, in words of strong denunciation or weighty threat. Here the trial judge was not mentioned by name, and it requires a laborious construction to read into the evidence even so

conduct of the trial judge, a nice discrimination between fair comment and attack upon integrity is required.

2. The court below took the view that participation in this area of public discussion is forbidden the lawyer of record *while the case is pending.* During that period, it held, "the only proper forum for the lawyer to vindicate his clients" is the courtroom. ". . . the judicial process is entitled to protection from those who get their license from a judicial temple . . ." [R. 562.] Laymen like Bridges and the Times-Mirror, it was said, are in a different category for they were not "court officers charged with the duty of keeping the temple clean." [R. 562.]

But this misconceives the nature and purposes of public discussion. The lawyer who comments publicly on the case in which he is engaged, as did petitioner here, seeks not to vindicate a client but to alert the public to what in his informed judgment is a serious problem, perhaps a public danger. Right or wrong, he affords the court no "protection" by silence. He discharges no "duty of keeping the temple clean" by withholding criticism. Neither the tabernacle of justice nor the householder's floor are cleansed by sweeping things under the rug. Surely a lawyer is free to tell the public that which he has already urged to the court itself, as did petitioner here. Silence on the part of counsel of record at the time the trial is under way may well result in no effective discussion of his grievances. The key concern of a free society is prompt and meaningful discussion of all issues affecting all branches of government without exception.

Additionally, there is nothing in the lawyer's license that renders him a built-in apologist for the *status quo* in the judicial branch. He owes no duty by silence or

utterance to afford "protection" to a judicial process that, through any means, results in unfairness or the appearance of it. The term "officer of the court" does not have a literal meaning (*Cammer v. United States*, 350 U. S. 399), and it surely does not conscript counsel of record to the task of by silence creating the appearance of justice to mask injustice or what in his informed judgment seems to be injustice.[37]

3. This is not to say that there are no limits to the lawyer's freedom of comment on pending cases. One is that indicated in *Bridges, Pennekamp* and *Craig, supra.* As with other citizens, he may not engage in utterances that create an "extremely high" risk of interfering with "fair judicial administration." This Court has wisely not attempted to draw any more specifically the line that sets apart the impermissible in this area. Nor need it in this case. The utterances charged against petitioner fall far short of the expressions given constitutional protection in the cited cases.

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[37]Implicit in the lower court's reasoning is a concept of loyalty owed by lawyers toward the courts as if they were employees or subordinates of the latter. This concept found expression in a recent address by the president of the American Bar Association: ". . . lawyers are officers of the court, and some of the same considerations which demand loyalty of subordinate officers in the military service, demand understanding and loyalty on the part of the bar, if the rule of law, administered by the courts, is to be sustained in the Nation." (*Los Angeles Daily Journal*, January 23, 1959, p. 1, col. 8.) It would be difficult to articulate a concept more destructive of professional independence and the advocacy expected of the bar, especially in the defense of individual dignity. See *Offutt v. United States, supra; Konigsberg v. State Bar*, 353 U. S. 252, 273; *Gallagher v. Municipal Court, supra.*

Another limitation is one growing out of the lawyer's position as such. His intimate relation to the court and the judicial process has been said to require that he not engage in comment that brings the courts into disrespect. But here there operates a strict test designed to protect both freedom of speech and the independence of the profession; to merit discipline the utterances must have an enormity that is not consistent with the ability of the court to maintain public respect. This concept has already been developed. (Point One, *ante.*) Suffice it here to state that the speech condemned by this test is that which (a) threatens the person or reputation of the judge or (b) charges that the judge or court has knowingly misused its powers in a particular case or (c) asserts that the judicial officer is corrupt. No such utterances are involved here.

These limitations, we submit, apply to lawyers whether they comment on pending matters in which they are of record or otherwise. The crucial fact is not their connection with the pending case but what, *as lawyers,* they say. The cases predicate the limitations here noted upon the lawyer's relation to the court, not to the case.

There remains the question whether other limitations operate upon the lawyer of record while the case is pending. Diligent research has disclosed no decision and no textual comment which, in American law, imposes any greater limitation upon such a lawyer than upon lawyers generally. So far as our inquiries show, the duty to maintain the respect owing the courts falls evenly upon lawyers of record and all other members of the profes-

sion. There would seem to be laid down in the authorities no other restraint upon a lawyer's public comment which has relevance here.[38]

4. The court below not only ignored these criteria, it rejected the clear and present danger test. [R. 563.] Since *Schenk v. United States,* 249 U. S. 47, the test of governmental power to limit speech has been whether its words and circumstantial context are such as to create a clear and present danger of bringing about a substantive evil within the power of Government to prevent. This

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[38]We are not unmindful of Canon 20. (A. B. A., Opinions of Committee on Professional Ethics and Grievances, 1957, p. 15.) This rule applies to the releasing to news media of facts or charges or opinions relating to the issues on trial or about to be tried. (See Opinion No. 199, Op. cit., p. 400 ff.) The objective of the canon would seem to be the release of information "intended or calculated to influence the decision in a pending case in which the writer is counsel." [Decision No. 256, op. cit., p. 641.] This view is reinforced by the comments of those who have studied proposals to revise Canon 20. Trumbull, *Materials on the Lawyer's Professional Responsibility,* 1957, pp. 196-200 esp. pp. 198, 199. While the conduct there covered is most usually adulged in by lawyers who are of record, it can also be the work of any other lawyer, or laymen.

This rule has no application here. Its purpose, obviously is to protect the fair administration of justice; it seeks to insulate the judicial scales from any influence not properly a part of the adjudicatory process. It cannot be seriously urged that petitioner's remarks created any such risk. Her subject matter, as shown in the Matsuoka notes, delivered to a group largely made up of union members already partisan to the defense in Fujimoto, given in a town of some 1000 souls over 180 miles across open sea from the seat of trial, and at a time long after the jury had been selected and, we may presume appropriately instructed to lay aside news reports about the case, could not possibly interfere with the process of adjudication in the *Fujimoto* case.

Finally, and doubtless controlling here, the trial committee, whose report framed the issues before the Territorial Court, found petitioner's speech to have been a violation of Canon 1 [R. 16]; this is the offense of failing to maintain the respect owing the courts. (Op. cit., p. 1.) Such also was the finding of the Territorial Court [R. 118] and it was this finding that the court below sustained. [R. 559, 570.]

test has been specifically applied to utterances concerning courts and matters pending before them with the express admonition that the evil must be "extremely serious" and the "degree of imminence extremely high" before the utterance can be punished. *Bridges v. California,* 314 U. S. at 263. While the clear and present danger test is not a formulary that substitutes for analysis, it does offer a method of evaluation that employs objective criteria reasonably referrable to legitimate ends of government. In rejecting this test the court below employed no comparable criteria. It particularized no evil to be avoided, no objective of public interest to be attained. It failed to examine the relationship, causal, logical or spatial, between the utterances in question and any legitimate concern of the state. It delineated no concern with free discussion to be balanced against objectives of government. The speech here was held to merit the drastic consequences visited upon petitioner because, for reasons not stated, it went beyond the undefined "restraints" said to be "applicable" to counsel of record while not "applicable to the public in general." These "restraints" were not specified, nor was their relationship to the aims of government defined or the circumstances giving rise to their operation. As has already been noted the authorities seem to impose no "restraints" other than those related to protecting the fair administration of justice and the public respect of the courts.[39] In this state of the law

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[39]We do not contend that in an appropriate case other limitations may not be found to outweigh the importance of public discussion. We do urge that this is not such a case and that any attempt here to fashion such other limitations here would be an attempt to formulate "a rule of constitutional law broader than is required by the precise facts of the situation." Mr. Justice Frankfurter concurring in *United States v. C. I. O.*, 335 U. S. 106, 126, 127; see also *Rescue Army v. Municipal Court,* 331 U. S. 549, *Federation of Labor v. McAdory,* 325 U. S. 450.

the undefined "restraints" invoked by the court below seem either to forbid all public comment concerning a pending case by the lawyer of record or, by the very ambiguity of language, to fashion a weapon of pervasive censorship.

Beyond such protean standards as those already indicated, the court below rested its judgment upon the observation that "the comment was unseemly and certainly at the wrong time" [R. 565] and the rather Delphic statement that the term "officer of the court" has "vitality and is not a transparent euphemism." [R. 566.]

The criterion of "unseemly" has no content and imports largely subjective values which vary with the personality of the listener. It is therefore censorial. *Thomas v. Collins,* 323 U. S. 516, 534; *Herndon v. Lowry,* 301 U. S. 242, 262-264. In any event the good taste or seemliness of the speaker is not the measure of his right to speak. *Cantwell v. Connecticut,* 310 U. S. 296, 310; *Craig v. Harney,* 331 U. S. at 376. Speech which stirs people to anger, invites dispute or brings about conditions of unrest is protected. *Terminiello v. Chicago,* 337 U. S. 1, 5. That petitioner was an "officer of the court" would appear irrelevant to her freedom to comment upon proceedings occurring there. This concept seems to import a relationship of subordination and consequent loyalty (already adverted to, see *ante,* p. 54) which is wholly incompatible with an independent bar. The standards set by the court below, then, are utterly inconsistent with the First Amendment which this Court has said "must be taken as a command of the broadest scope that explicit language which, read in the context of a liberty-loving society, would allow." *Bridges v. California, supra,* at p. 263.

Resolution of the issues posed by the judgment below on the Honokaa speech calls for balancing the interest of public respect and confidence in the courts against that of free public discussion by the lawyer of record in a pending trial. On the facts of record we submit the balance favors petitioner's speech. This was a generalized discussion of what petitioner saw as evils in enforcement of the Smith Act. She presented informed comment on public issues of current importance. These were not fancied grievances. So far as they dealt with abuses of the conspiracy theory they echoed and relied upon the troubled reflections of the bench and bar over many years, and in respect of the use of perjurious witnesses they posed a problem that finally reached this Court.[40] There was no direct attack upon or criticism of Judge Wiig, and the finding that there was rests upon "implication" from the fact that petitioner spoke of a pending trial over which Judge Wiig presided. These implications further rest upon laymen's rendering of a lawyer's attempted vulgarization of technical legal concepts and a strained gloss of words, such as the pronoun "they" in an account which is at best elliptical note-taking never intended to be verbatim.

All that petitioner said, at least in respect of the abuse of the "sprawling" conspiracy "strategy," the "loose application of rules of evidence,"[41] the unfavorable trial climate created by government propaganda, and the perils of thought control, she had already urged orally and in writing to the court's face during the very pending case in question. The speech was given to an audience made up

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[40]See *ante* p. 51, n. 35.

[41]The quoted words are from Mr. Justice Jackson concurring in *Krulewitch v. United States,* 336 U. S. 440, 453.

largely of contributors to the defense in a hamlet located over 180 miles from the courthouse, and the record shows no effort on her part to publicize her remarks. Petitioner at the time was a lawyer of some 16 years standing, whose record was unblemished by misconduct and distinguished by the quality of her advocacy. No intent to show disrespect to the courts is fairly inferable from the surrounding circumstances and no calculation to this end appears from the words used. It does not seem likely that a lawyer of this stature, bearing the heavy responsibility of defending clients in so difficult a situation would purposefully attack in a public meeting the trial judge before whom she daily carried on her duties.

The evidence of what was said and the circumstance of its utterance thus lacks the solidity "required to outweigh the underlying importance of First Amendment liberties. See *Pennekamp v. Florida*, 328 U. S. at 347, 348, and cases there cited.

It is difficult to isolate from this record any real or substantial governmental interest that has been affected. That Judge Wiig as an individual evinced some sense of personal hurt or involvement [R. 583, 584] is no measure. Here we deal with an institution not an individual; subjective reactions are too variable a test. In the fair administration of justice cases this Court assumed a judge "of fortitude, able to thrive in a hardy climate." *Craig v. Harney*, 331 U. S. at 376; see also *Pennekamp v. Florida*, 328 U. S. at 349; *Bridges v. California*, 314 U. S. at 273, 278. Where, as here, the public interest is public respect for the courts, it may be assumed that the individual judge has a hardy self-esteem and the public a willingness to weigh all comments on its institutions rather than be led off by any single utterance. (Compare

Pennekamp v. Florida, supra, at 349.) Otherwise adjudication would be misled by fine-drawn theories and speculations dealing with subjective reactions and suppositious thought processes. The very possibility of these factors would negative immediacy of danger to the public respect for the judiciary. Nothing appears in the record to show that the asserted loss of public respect did or could rationally flow immediately from the utterances in question. In this connection it is appropriate to observe that it is inherent in our institutions that the public be able to hear and consider comments on judges and their work which, directly or indirectly, had to consider their worth as public servants and their right to continue in office.[42]

Having in mind the tenuity of the evidence as to the words used and their meaning, the substantial doubt as to their thrust against the judge, and the circumstances of their use, this record does not, on balance, make out a danger to public respect for the courts. Whatever danger can be raised from the record is speculative and remote, based on attenuated implications, and having neither the clearness nor the immediacy to warrant an embargo on permissible public comment.

The impact of such First Amendment standards as those employed below on professional independence is

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[42]This proposition underlies *Bridges, supra,* esp. at 270; *Pennekamp, supra,* esp. at 347; *Craig, supra,* esp. at 376, 377. See also Circuit Judge Soper in *In re Ades* (DC Md.), 6 Fed. Supp. 467, 481 ". . . An attorney does not surrender, in assuming the important place accorded to him in the administration of justice, his right as a citizen to criticize the decisions of the courts in a fair and respectful manner, and the independence of the bar, as well as of the judiciary, has always been encouraged by the courts." *In re Breen,* 30 Nev. 164, 181, 93 Pac. 997, 1002 "Any tribunal that can not tolerate free discussion and criticism of its decisions is justly entitled to contempt."

manifest. The lawyer is afforded no test whereby before he speaks he can measure his utterances against permissibility in terms of his professional position or the legitimate concerns of government. The criterion of "unseemly" indicated in the opinion below, especially when combined with the process of arbitrary inference indulged by both lower courts (see *ante*, Point One), would have the lawyer "at the mercy of the varied understanding of his hearers." *Thomas v. Collins, supra,* at 535. In these circumstances there is only one safe course—not to speak.

But not speak for how long? Until the last conceivable judicial act has been performed in the case? Not, let us say, from 1951 when the *Fujimoto* indictment was found until 1958, when it was dismissed? Or to speak, but ever so cautiously? Even the most considered criticism of the conduct of a trial that broached upon the nature and effect of rules of law applied therein would be open to some claim that it attacks the trial judge. At the very point where public discussion can perform a more valuable function it would be inhibited by vague and censorial standards. Just when public debate can be advantaged by the informed comment of the lawyer on matters within his special ken, it would be deprived of his contribution.

Of no less moment is the effect of these restraints upon the lawyer's court room advocacy. If a lawyer is to be disciplined for his criticism of rules of law and their application, the tactics of the prosecutor and other law enforcement agencies when these criticisms are made in public 180 miles from the seat of trial, he will be hesitant to say them to the judge's face. We have no place for a bar that is not free to tell a judge that he is not giving an accused a free trial or that his rulings advantage an opponent.

This Court has expressed concern for the independence of the bar, "that lawyers be unintimidated—free to think, speak and act as members of an Independent Bar." *Konigsberg v. State Bar*, 353 U. S. 252, 273. The lawyer's responsibility is not only to afford "fearless, vigorous and effective" advocacy (*Offutt v. United States*, 348 U. S. 11, 13) but also to serve as a tribune "to warn their fellows when liberty is threatened and to lead them in combating the danger." Editorial, *Liberty Under Law* (1953), 39 A. B. A. J. 692. They serve in the field of law and the administration of justice important functions of informing the people concerning criticism of the laws and the current proceedings in the courts.[43]

The holding below is directed away from this glorious tradition. It points in the direction of a subservient bar, "loyal to the court (or perhaps the occupant of the bench), obedient in the fashion of a subordinate officer, more concerned with the toleration of the bench than the vindication of clients. It is offensive to the very spirit of our institutions. It would leave individual liberty unable to choose a free defender.

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[43] *In re Hearings on Canon* 35 (Colo., 1956), 296 P. 2d 465, 470; Jessup, *The Professional Ideals of the Lawyer, A Study of Legal Ethics* (N. Y., 1925), p. 24

"The Traditional function of lawyers is that of servant to the whole people, guarding justice and expanding the areas of individual freedom. The judgment of history on the lawyers of our generation will be based on how adequately we have fulfilled this noble calling." William T. Gossett, General Counsel to Ford Motor Co., *Address to Michigan Judges Ass'n, Release of Ford News Bureau*, Sept. 5, 1952. "No one suggests that the American people should follow implicitly or blindly the leadership of their lawyers; but in the discussion of changes in the American form of government and in the purposes of American institutions and laws, the lawyers should do their part in the informed discussion of the great issues before the people." Judge William L. Ransom, former president of the American Bar Association, quoted by Hon. Nathaniel Goldstein, Attorney-General

POINT THREE.

In Holding That Petitioner's Post-Verdict Interview of the Juror, Fuller, Was Gross Misconduct the Court Below Established and Applied a Principle That Undermines the Ability of the Bar to Protect Clients and Courts From Tainted Judgments.

Petitioner interviewed, post verdict, a juror who had served in the *Fujimoto* case. This she did at the request of his sister and with the consent of his wife after having been told that the juror appeared to be ill and irrational and had made many statements to the effect that he had acted wrongly and that the case was a "frame-up." She inquired of him what had gone on in the jury room in an obvious effort to ascertain either (a) possible infirmity in the verdict by reason of this juror's imbalance during the trial or (b) the factual basis for the assertion of wrongdoing and frame-up. The language of the Ter-

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of the State of New York, 16 Albany L. Rev. 9 (1952). "The lawyer must not only understand the ways of democracy; he must live the ways of democracy; he must teach others and lead a nation in the ways of democracy." Hon. Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska, 23 Neb. L. Rev. 75 (1944). "Our constitutional rights of free speech and of freedom of assembly make this opportunity for advocacy available to all. Advocacy is peculiarly available to the lawyer because of his special skills." Mr. Justice William O. Douglas, *The Lawyer and the Public Service*, 26 A. B. A. J. 633, 636 (1940). "There is no reason in the world people should not criticize the [Supreme] Court. I believe in criticizing the Court, Congress, even the Governor . . . I do not think there is any group in America outside the lawyers who can be expected to preserve the individual liberties about which people speak." Mr. Justice Hugo L. Black, *The Lawyer and Individual Freedom*, 21 Tenn. L. Rev. 461, 463, 469 (1950). See also, Myron C. Taylor, Letter to the Board of Trustees of Cornell University, 14 Cornell L. Q. 197, 198 (1929), quoted in Cheatham, *Cases and Materials on the Legal Profession* (1938), p. 398; Cooley, *Constitutional Limitations* (8th ed., 1927), vol. 1, p. 703, n. 3; Hon. Stanley H. Fuld, Associate Judge New York Court of Appeals, *The Lawyer—More Than Advocate*, 15 Albany L. Rev. 1 (1951); Justice William O. Douglas, *"Law in* Eruption," *A Concept of Lawyer's Duty in a Time of Change*, 34 A. B. A. J. 674 (1948).

The case is particularly apposite here. There, as here, the lawyer's conduct related to a case pending in the federal court. There, as here, whether the conduct was actionable at all turned peculiarly on this relationship in the context of the case and the effect thereon of the acts charged. The judgment in both cases has a far-reaching impact on the effectiveness and independence of the lawyer in the discharge of his responsibility to the court and its litigants. For all these reasons the restraint shown by New Jersey should have been emulated by the Territory. Because the disregard of these restraints may, as here, lead to serious interferences with the federal bar and the administration of justice in the federal courts, it is appropriate that this Court furnish guidance for both the federal and the local jurisdictions.

Conclusion.

Upon all of the grounds urged herein, separately and together, the judgments of the lower courts should be reversed and vacated.

Respectfully submitted,

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ritorial Court and its reliance upon *Rakes v. United States* (C. A. 4), 169 F. 2d 739 [R. 119, 120] make it plain that the mere interview and interrogation of the juror constitute the gravamen of the offense found.

This is a question for this Court to settle because petitioner's conduct occurred as counsel of record in a case in a federal court with respect to a juror who had served in that same court. This Court's supervisory powers are invoked both because the attorney's conduct occurred in a federal court and because the court below has enunciated a principle for all federal courts—at least those in the Ninth Circuit.[44] *McNab v. United States,* 318 U. S. 332, 340. The issue is whether a lawyer, a member of the bar of a District Court, while serving in a case pending in that court, commits gross misconduct by interviewing an excused trial juror in that case concerning matters related to the juror's possible mental illness and his asseverations of wrong-doing and frame-up. This problem relates both to the scope of a lawyer's freedom in the federal jurisdiction to investigate facts bearing upon his client's rights as well as the protection afforded the court where a cloud is cast upon its judgment. This is no local matter for the Territorial Court or the Territorial Bar. The conduct here occurred in a federal case in a federal court. The court below has held it was misconduct in the federal jurisdiction. In an earlier decision the court below reached a similar result (*Northern Pacific Railway v. Mely* (C. A. 9), 219 F. 2d 199) as did the Fourth Circuit in *Rakes, supra.*

The question calls for a nice balancing of weighty interests. In *Mely* and *Rakes* it was thought that the

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[44]This principle is also operative in the Fourth Circuit under *Rakes v. United States, supra.*

need for insulating trial jurors from "potential" outside influence arising from an awareness that they might be interrogated concerning the occurrences in the jury room, required the prohibition against interrogation by lawyers. On the other hand there is the public concern in obtaining honest, untainted verdicts by rational jurors. In this connection it has long been recognized that to foreclose all evidence, taken from the jurors' mouths, of influences upon the deliberations might well violate the "plainest principles of justice." *United States v. Reid,* 53 U. S. 361, 366. In that case and in *Mattox v. United States,* 146 U. S. 140, 148-150, this Court held that evidence of "overt acts" (as contrasted with "the personal consciousness" of the jurors, their thought processes) would be admissible to show improper influence upon the verdict. These cases recognize that the existence of "overt acts" is subject to proof and rebuttal by ordinary means of trial whereas matters pertaining to the juror's mental state are incapable of such proof except by the juror's word alone. It would seem that only in the latter case has the rule against permitting the juror's testimony to impeach his own verdict had its genesis and application. *Hyde v. United States,* 225 U. S. 347; *McDonald v. Pless,* 238 U. S. 264. Judge Learned Hand has cogently argued that the rubric against permitting the jurors to impeach their verdict forecloses valuable evidence and that the correct rule should be as here stated from the *Reid* and *Mattox* cases. *Jorgensen v. York Ice Machinery Corp.* (C. A. 2), 160 F. 2d 432. See also Wigmore, *Evidence,* 3d Ed., Sec. 2353; Compare *Clark v. United States,* 289 U. S. 1, 12, 13, 16, 18.

A brief analysis of the authorities upon which the court below relied as well as that on which the original bill of particulars amplifying complaint was predicated [R. 3, 5,

13], show their inappositeness here. They do not involve the same weighty interests on balance in this case. In *Rakes* a convicted defendant sought to overturn the verdict by jurors' affidavits to the effect that they had seriously doubted the defendant's guilt, apparently because they thought he did not understand the meaning of his acts; that had they known that the court would acquit his co-defendants they would not have agreed to the guilty verdict; and that they yielded to the arguments of other jurors. These matters involve neither wrongdoing nor mental incompetence. They are clearly evidence of the jurors' thought processes, their "personal consciousness" and therefore are controlled by the *Hyde* and *McDonald* cases, *supra*. The same may be said of the *Mely* case. The jurors' affidavits dealt only with the arguments of their fellow jurors, without hint of improper conduct or mental disorder.

The Bar Association's complaint cites Opinion 109 of the American Bar Association Committee on Professional Ethics. There the Committee dealt with an inquiry of an apparently youthful practitioner who had interrogated jurors "concerning how certain aspects of the case impressed them, what they thought of certain evidence . . . and how certain members of the jury stood on certain questions." *ABA, Opinions of the Committee on Prof. Ethics,* 1957, pp. 231, 232. Such conduct does not touch upon the issues here. It is noteworthy that the Committee, in disapproving the interrogation described, expressly refrained from condemning inquiry of the jurors "to prevent a miscarriage of justice" or "where a juror has been guilty of fraud." (Op. cit., p. 234.)

Surely facts relevant to a juror's wrong-doing and "frame-up" in a federal prosecution or his mental im-

balance while serving, might well have been admissible to overturn the *Fujimoto* verdict. That being so, petitioner was right in trying to find out what facts there were by interviewing the juror who spoke of these things. She could have done no less to discharge her responsibility to both the District Court and her clients who then faced long prison terms and heavy fines. Here, surely, the public interest in the purity of justice outweighs any other. It would indeed be a hollow rule ringed with irony that would make evidence of this kind admissible but hold the lawyer's investigation of suggestions of it to be misconduct. Nor is it practicable narrowly to circumscribe the lawyer's conduct by making its disciplinary consequences turn upon the admissibility of the facts his investigation discloses. If he acts upon facts sufficient to put a reasonable person on inquiry he should not be required to develop admissible evidence on pain of severe discipline. Any more severe test would inhibit the lawyer by fear of subsequent punishment and thus deprive the administration of justice of invaluable assistance.

But the rule of the court below makes any inquiry of jurors under any circumstances misconduct subject to severe sanctions. Interview of jurors in connection with matters which affect, in the words of this Court, "the plainest principles of justice" are absolutely interdicted equally with those which are inadmissible to affect the verdict. It places a crippling restraint upon a lawyer's performance of tasks essential to the protection of the individual and the court. It menaces the independence of the profession. To forbid the lawyer to act as did petitioner in the premises of this case is to amputate an arm of the court, to destroy a shield of the accused. This restraint operates in the federal courts until removed by this Court.

POINT FOUR.

The Judgment of the Territorial Court, Affirmed Below, Was Beyond Its Jurisdiction.

The Territorial Court imposed discipline on petitioner for her conduct in a matter pending in the federal court. As to the Honokaa speech, it was the gravamen of the charge as well as of the finding [see R. 116] that petitioner said the things specified while counsel of record in a case pending in the federal court and concerning the trial of that case. It was concluded that petitioner attacked the administration of justice in that court and impugned the intergrity of a judge of that court. Petitioner's conduct in the juror interview was manifestly in the course of her work as counsel of record in a case pending in that court and related to a juror and the probity of the verdict therein. In affirming the judgment on the Honokaa speech aspect of the case, the court below rested its decision largely, if not exclusively, on the proposition that petitioner's speech was made during the trial by one who was counsel of record. In all probability it rested its opinion concerning the juror interview on the reasoning of the *Rakes* and *Mely* cases, *supra*, which state the rule as one purposed to protect federal juries in federal courts.

In disciplining petitioner, the Territorial Court laid down standards of conduct for attorneys of the federal court engaged in cases before that court. This standard, as to petitioner's speech, is, in effect, that criticism of the manner in which a trial is carried on while the same is in progress is misconduct meriting discipline. Very narrow limits are thus set upon the area of allowable comment concerning pending matters by attorneys. They are far more confined than the bounds indicated in the

Bridges, Pennekamp and *Craig* cases, *supra,* as well as in those dealing with the offense of bringing the courts into disrespect. (See *ante,* pp. 45, 46, n. 30, 31, 32.)

As to the juror interview, the standard is that no lawyer will be permitted, after verdict, to interview any juror concerning any matter occurring in the jury room, no matter what its nature or effect. And this standard gravely encinctures the activities of lawyers in protecting both the temple of justice and the rights of their clients.

But the first issue here is not where the standards should be fixed, but which court should set them. For here we deal with members of the bar of the federal court engaged in matters before that court. To fashion a standard in these circumstances is intimately to affect the administration of justice in the federal court. As a naked proposition it would seem unassailable that the federal court should determine the rules of conduct for attorneys in matters before that court. The lawyer as advocate and officer of the court discharges important responsibilities in guiding and assisting the court in the dispensation of justice under law, in the protection of individual dignity and rights. It would seem no more open to another judicial system to prescribe the propriety of the federal attorney's conduct before the federal bench than to prescribe the same outside the federal court room with respect to a pending federal case.

The standard as set by the Territorial Court must of necessity affect the administration of justice in the federal courts on a day to day basis. For every member of the bar of the federal court who is also a member of the bar of the Territorial Court (and we suspect that there are few who do not belong to both) must comply, in his federal practice, with this territorial standard or be sub-

ject, as was petitioner, to discipline in the Territorial Court. Thus the licensing power of the Territorial Court is used both to create and impose the territorial standard upon attorneys in their practice before the federal courts. As a matter of specific practice, the imposition of discipline by the Territorial Court automatically leads to disciplinary proceedings, initiated by forthwith suspension from practice, in the District Court in accordance with its Rule 1(d). (App. p. 85.) And, indeed, proceedings are now pending against petitioner in that court to discipline her there on the basis of the judgment of the Territorial Court here under review. The attorney who belongs to the bar of both courts, then, would be under compulsion of discipline to observe in his federal practice a rule or standard of conduct concerning that practice laid down by the Territorial Court, and, if discipline were imposed by that court, it would lead to further disciplinary proceedings in the federal court. The territorially-fixed standard could thus be enforced against the federal attorney in both courts and all at the initiation of the Territorial Court.

It is to be emphasized that we do not deal here with misconduct which is well-defined and universally condemned as destructive of professional qualifications. This is not a case of suborning perjury or stealing a client's funds. In such matters the content of the offense is the same anywhere, and the only inquiry would be whether the offense had been committed. Any court whose license the lawyer holds would have competence to act.

Here petitioner was charged with conduct the very quality of which, for disciplinary purposes, stemmed from its relationship to the matter pending in the federal court and her participation therein. The question was not whether she had done an act all legal standards condemn.

Rather, it was whether, in the context of the case then pending, the things she said or did could fairly be held so to transgress the bounds of propriety as to merit discipline. It was the effect, if any, on the federal court, upon the trial of a case in that court, and its jury system, which would render petitioner's conduct censurable.[45] Unless power to make that determination is to be reserved to the federal court it is *pro tanto* deprived of power to manage its own affairs. Similarly, it was for the federal court to decide how to make the delicate adjustment, *in its court*, of the competing interests of a public confidence in the judiciary and full public discussion, as well as the concern for the inviolability of jury deliberations and the protection of the jury system from wrong-doing and frame-up. The federal court had both power and the right (indeed the duty) as to matters before it, to set the standard. For the setting of the standard is inseparable from the administratoin of justice in its forum.

It is in these lights the genesis of the charges against petitioner takes on a gravity weighted by considerations of proper relationships between the two judicial systems. Judge Wiig was deeply concerned over the initial reports of petitioner's speech. [R. 31-33.] She was a member of the bar in his court, and that court had power to punish her for contempt or discipline her for misconduct—*if, by the federal court's standards*, such was warranted. Judge Wiig ordered an investigation, and from the fact that the evidence adduced below came to the Bar Association's counsel from the F.B.I. [see R. 192.

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[45]It was precisely this about which Judge Wiig evinced immediate concern [R. 32], and his failure to act in his judicial capacity after full investigation the more significantly reflects a determination that petitioner's utterances did not deserve discipline or punishment.

195, 185-186, 173, 154], it is inescapable that the investigation was made. Judge Wiig took no action; the District Court took no action.[46] If there was any merit to the complaint against petitioner, Judge Wiig's suggestion that the Bar Association look into the matter set in motion a train of events that led to a usurpation of his court's power in a matter gravely affecting its administration of justice.

The preservation of the federal court's jurisdiction to manage its own affairs also serves an important policy consideration. To permit this essentially federal matter to arise upon complaint of a local bar association, be heard in a local proceeding and be determined by a local court creates too facile an opportunity for the impact of local currents. It is a commonplace that local forces, whether official or not, are less sensitive to broader policy considerations of national stature and that local agencies of publicity may evince less vigilance in calling them to account. Compare *Board of Education v. Barnett*, 319 U. S. 624, 637, 638. Whether this narrowing of horizon results from mere preoccupation with local interests or the pursuit of selfish advantage, it necessarly disqualifies the local tribunal from creating the standards whereby the important interests here are weighed and determined.

Petitioner's record shows long service on behalf of the labor organization representing the non-Haole working people of the Islands as well as many individuals from this stratum in a social structure which is so sharply divided as to merit the description "tense" in the area

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[46]From this it might well be argued that it was determined that petitioner's conduct transgressed no federal rules. This the more so because of Judge Wiig's praise of all counsel, including petitioner, at the end of the *Fujimoto* trial. [R. 510, 524.] But it is not necessary to reach that question.

of labor relations (*ILWU v. Ackerman, supra,* at p. 77) and generally as a "welter of divergent . . . characteristics and clashing economic interests." *United States v. Fujimoto* (D. C. Haw.), 105 Fed. Supp. 727, 729. Some of the litigation in which petitioner has been involved found her pitted against the complaining bar association in the *Ackerman* case (9 Cir., 187 F. 2d 860, cert. den. 342 U. S. 859) and against one who later became a justice of the Territorial Court which reached the judgment here under review (*Alesna v. Rice, supra*). In nearly all of her career she has radically challenged the *status quo*. As petitioner's affidavit supporting her suggestion of disqualification of Mr. Justice Rice of the Territorial Court indicates [R. 52-65], by long background, experience and family connections, if not by immediate personal interest, Mr. Justice Rice and petitioner stem from opposite poles in an extremely complex and profoundly defined social antagonism. The curious amendment of Rule 19, following the commission of the offenses charged against petitioner, so as to permit the bar association to file a complaint in the Territorial Court after no action had been taken in the federal court, cannot be viewed in isolation from this whole background.

This is not to say that the judgment of the Territorial Court is tainted by these influences. Nor need this Court so decide. In areas of exclusively federal concern, however, it is established policy to eliminate the opportunity as well as the appearance of local influence toward local ends, whether these reflect group ambitions or personal bitterness. Compare *Pennsylvania v. Nelson*, 350 U. S. 497, 507. Given the setting of the Territory as recognized by two Circuit judges, and petitioner's professional

record as exemplified by the case reports alone, one cannot say that the potential for local influence was lacking. It is to neutralize that potential that the policy here contended for would operate. The policy we submit is wise whether or not the evil exists in a specific case. For all these reasons we submit that sound considerations of policy warrant the voiding of the judgment of the Territorial Court. It is one thing for that court to fix its own rules of conduct for lawyers in cases before the Territorial Court. It is quite another for that court to prescribe standards of conduct for federal attorneys in cases pending in the federal courts. The "deference" normally shown by federal authority for the integrity of a local jurisdiction is, we submit, a two-way street. Compare *Waialua Agricultural Company v. Christian*, 305 U. S. 91, 108-109.

In re Isserman, 9 N. J. 269, 87 A. 2d 903, relied on by the majority below [R. 566], does not support the procedure followed in this case but rather supports petitioner's position. Isserman had been charged with contumacious conduct toward the federal court in the course of the trial of the *Dennis* case. He was adjudged guilty of contempt by federal standards and all questions relating thereto were finally resolved by this Court before the state court acted. *Sacher v. United States*, 343 U. S. 1. The state court's decision rests, not upon its own evaluation of Isserman's conduct in accordance with its standards, but rather upon its acceptance of the federal court's evaluation by its own standards. New Jersey did not undertake to decide that Isserman had committed an offense against the federal court. But it having been finally decided by the federal courts that he had committed that offense, New Jersey determined his fitness on that account to remain a member of its bar.

APPENDIX.

Pertinent Portions of Rule 19, Rules of the Supreme Court of the Territory of Hawaii, as Amended, October 31, 1953.

19. RULE GOVERNING PROCEEDINGS TO STRIKE ATTORNEY'S NAME FROM ROLL AND THE UNLAWFUL OR UNAUTHORIZED PRACTICE OF LAW.

1. Complaints against members of the bar for improper or unprofessional conduct shall be in writing and filed in triplicate by the attorney general, any of his deputies, or any person aggrieved by the conduct of any attorney licensed to practice in any territorial court, with the clerk of the supreme court of the Territory of Hawaii, who shall keep the same in a secret file available only to the justices of the supreme court, the person charged, and the committee to which the court may have referred the matter for investigation as hereinafter provided.

Such complaint need not be formal but shall be in writing and set forth with reasonable certainty the time, place and circumstances of the alleged misconduct, and if filed by anyone other than the attorney general or one of his deputies, it shall be verified under oath, and the court may require the same to be made more specific.

If the court deems that the complaint sets forth a *prima facie* case of misconduct warranting investigation, it may refer the same to a standing committee, to be known as Committee on Legal Ethics, consisting of three members of the bar, appointed by the court for investigation. The members of said committee shall hold office at the pleasure of the court. Such committee shall furnish the accused person with a certified copy of the complaint which shall be prepared by the clerk of the supreme court. Any at-

torney complained of may file an affidavit of bias and prejudice with the court concerning any member of the committee at any time prior to the commencement of the hearing by the committee. If the court shall find the same well-founded the court shall appoint another person to such committee to replace the member thus disqualified.

Such committee is hereby empowered and charged to investigate and take proof concerning such complaint. The hearings before the committee shall be private, unless the attorney charged shall request that they be public. The person charged shall be entitled to be present at every hearing of the committee and to be represented by counsel, to cross-examine witnesses, and to submit such evidence as he desires. Upon request of the committee, this court may assign a reporter of the circuit court to take and transcribe shorthand notes of the testimony, and a clerk of the circuit court to administer oaths, in the same manner as before a circuit judge.

Upon application by such committee, the clerk of this court shall issue writs of subpoena *ad testificandum,* writs of subpoena *duces tecum* or *dedimus potestatem* to take depositions. Any person failing to obey any such subpoena shall be in contempt of this court and subject to punishment accordingly.

At the end of the hearing, the committee shall make report to this court of its findings of fact and conclusions of law and file therewith the record of such hearing, all of which shall be kept by the clerk in a secret file available

only to the attorney charged and to the justices of
supreme court. The attorney charged shall, upon requ
be entitled to receive from the clerk of the supreme co
a certified copy of the committee's report and the rec
of the hearings had before the committee. If the comm
tee shall recommend disbarment or other discipline,
matter shall then be docketed, made a matter of pu
record, and entitled in the name of the attorney charg
and thereupon an order shall issue from this court to
attorney charged to show cause, if any he has, why
findings and conclusions of the committee should not
adopted, and such judgment as the court may deem pr
entered. When the rule shall be answered the court s
fix the time for hearing, and may designate the attor
general or one of his deputies or any member of the ba
this court to present the case on behalf of the complain
The matter shall be tried *de novo* by the court, and s
judgment shall be entered as the court shall deem pro

Pertinent Portions of Rule 19, Rules of the Supreme Court of the Territory of Hawaii, as Amended, April 21, 1954.

RULE 19. IMPROPER OR UNPROFESSIONAL CONDUCT AND UNAUTHORIZED OR UNLAWFUL PRACTICE OF LAW.

1. Complaints of improper or unprofessional conduct by any attorney licensed to practice in any court of the Territory of Hawaii (hereinafter referred to as the licensee) or of any unauthorized or unlawful practice of law by any individual, partnership, corporation or other entity (hereinafter referred to as the person charged) may be filed in this Court by the Attorney General, the Bar Association of Hawaii (hereinafter referred to as the Bar Association) or any person aggrieved.

The complainant shall, if other than the Attorney General or the Bar Association, verify the complaint under oath. An orginal and five (5) copies of the complaint shall be filed with the Clerk of this Court (hereinafter referred to as the Clerk), who shall keep the same in a secret file available only to the Court and to such other persons as herein provided.

The Court shall refer the complaint to its Committee on Legal Ethics and Unauthorized Practice (hereinafter referred to as the Committee), which shall consist of seven (7) members of the Bar of this Court, of whom five (5) constitute a quorum. Members shall be appointed by and hold office at the pleasure of the Court. The Court shall designate the Chairman. The Committee shall hold its hearings in the courtroom of the Court. All expenses incurred by the Committee in connection with

its hearings shall be borne by the Court. The Committee shall be empowered, subject to the approval of the Court, to formulate rules for the government of its procedure.

The Committee shall cause the licensee or the person charged to be served, in the manner provided by law, with a copy of the complaint, together with a notice of the time and place of hearing. Due return of the service of the complaint and notice shall be filed with Committee. If the complaint shall have been filed by other than the Bar Association, a copy of the complaint and notice shall be furnished the President of the Bar Association and the Bar Association shall thereafter be permitted to appear at any hearing before the Committee or proceeding before the Court as *amicus curiae*.

The licensee or person charged shall have the right within ten (10) days prior to the date set for the commencement of the hearing to file an affidavit of bias and prejudice concerning any member or members of the Committee. All challenges raised by such affidavit shall be passed upon by the Committee, whose determination with respect thereto shall be final. In the event challenges determined to be well founded shall reduce the number of available members of the Committee below that necessary for a quorum for the hearing of the matter complained of, the Court shall make additional appointments to the Committee.

The Committee is empowered and charged to conduct a hearing for the investigation of those matters raised by the complaint. The hearing shall be closed unless the licensee or person charged makes a written request prior to the commencement of the hearing that it be a public hearing. The licensee or person charged shall be entitled

to be present at the Committee hearing, to be represented by counsel thereat, to cross-examine witnesses, and submit evidence. Hearings shall be conducted in such manner as to permit the admission of relevant evidence. Upon request of the Chairman, the Court may assign a reporter to record and transcribe testimony and a clerk to administer oaths. Upon application of the Chairman, the Clerk shall cause to be issued, writs of subpoena *ad testificandum, duces tecum* or *dedimus potestatem*. Failure to obey any such subpoenas shall be deemed contempt of the Court.

On completion of the hearing the Committee shall file with the Court its findings of fact, conclusions of law and recommendations as to action to be taken by the Court in the matter, together with the entire record of its proceedings, including all papers, transcripts, minutes and exhibits, all of which shall be kept by the Clerk in the secret file. The licensee or person charged, and, upon request, the Bar Association and the Attorney General, shall be entitled to receive from the Clerk a certified copy of the findings of fact, conclusions of law and recommendations of the Committee.

If the Committee shall recommend disciplinary action be taken against the licensee or a judgment entered against the person charged, it shall submit an Order to Show Cause issuable from this Court, addressed to the licensee or person charged, directing within twenty (20) days of issuance that cause be shown, if such exists, why the findings, conclusions and recommendations of the Committee should not be adopted. Upon issuance of the Order the same shall be served upon the licensee or person charged, in the manner provided by law, and the case shall be docketed and made a matter of public record.

The Court may designate the Attorney General or one or more members of the Bar of this Court to present the case on behalf of the complainant. Upon an answer being filed to the Order to Show Cause, the Court shall fix a time for hearing and the matter shall be heard *de novo*. On failure of the licensee or person charged to answer as required in the Order, default shall be entered and proof, should the Court so order, may be made *ex parte*. Such judgment may be entered as the Court shall deem proper.

Nothing herein contained shall be construed to require this Court to follow the recommendations of the Committee and irrespective of such recommendations this Court may, in its discretion, proceed or refrain from proceeding in any cause falling within the purview of the Rule.

2. The presently existing jurisdiction and power of this Court and the other Courts of the Territory of Hawaii to grant appropriate relief in causes involving improper or unprofessional conduct by attorneys or unauthorized practice of law by other persons, shall not be deemed to be limited, restricted or abrogated by anything contained in Section 1 of this Rule.

3. This Rule shall become effective forthwith and shall govern all proceedings brought on or after this date, and all pending proceedings except to the extent that in the opinion of the Supreme Court the application of the Rule to a pending proceeding would not be feasible or would work injustice in which event the former procedure shall apply. April 21, 1954.

Rule 15 (d), Rules of the Supreme Court of the Territory of Hawaii (Effective October 3, 1955).

RULE 15. ADMISSION TO THE BAR.

. . . (d) Reinstatement of Disbarred or Suspended Attorneys. No attorney who has been disbarred or suspended shall be eligible for reinstatement except upon a clear showing that he has complied in good faith with the order of disbarment or suspension, and that he is entirely worthy of the court's trust and confidence. An attorney who has been disbarred, or suspended for a period of six months or more, upon certification by the court of his eligibility, shall be required to pass an examination as though applying for admission to the bar.

Pertinent Portions of Rule 1, Rules of Civil Procedure for the United States District Court for the District of Hawaii (as Amended and Effective March 21, 1955).

RULE 1. ATTORNEYS.

(a) Roll of Attorneys.

The bar of this court consists of those heretofore and those hereafter admitted to practice before this court, who have taken the oath prescribed by the rules in force when they were admitted or that prescribed by this rule, and have signed the roll of attorneys of this district.

(b) Eligibility.

Any person who is a member in good standing of the bar of (1) the highest court of this Territory or of (2) the highest court of a state is eligible for admission to the bar of this court.

* * * * * * * * * * * *

(d) Disbarment and Discipline.

Any member of the bar of this court may for good cause shown and after an opportunity has been given him to be heard, be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper.

Whenever it is made to appear to the court that any member of its bar has been disbarred or suspended from practice or convicted of a felony in any other court he shall be suspended forthwith from practice before this court and, unless upon notice mailed to him at his last known place of residence he shows good cause to the contrary within 20 days, there shall be entered an order of

disbarment, or of suspension for such time as the court shall fix.

Any person who before his admission to the bar of this court or during his disbarment or suspension, exercises in this district in any action or proceeding pending in this court any of the privileges of a member of the bar or who pretends to be entitled so to do, is guilty of contempt of court and subjects himself to appropriate punishment therefor.

(e) Disciplinary Proceedings.

(1) The court will appoint by an order entered in its minutes a "Standing Committee on Discipline," consisting of five members of the bar, and will designate one of the members to serve as chairman. The members shall continue in office for a period of two years or until further order of the court.

(2) It shall be the duty of the committee to investigate any charge or information, referred by one of the judges or otherwise coming to the attention of the committee, that any member of the bar may have been guilty of unprofessional conduct or of any conduct unbecoming a member of the bar of this court; and in cases where a majority of the members shall deem advisable, the committee shall institute and prosecute an appropriate disciplinary proceeding.

(3) Every proceeding hereunder shall be commenced by filing with the clerk an appropriate petition on behalf of the committee addressed to the judges of the court. Upon the filing of the petition, the proceeding shall be assigned to one of the judges in the same manner as any other civil action or proceeding pursuant to directions given to the clerk by the court.

(4) The judge to whom the proceeding is assigned shall forthwith issue an order to show cause, addressed to the respondent member of the bar, requiring him to appear and show cause within not less than ten nor more than twenty days from the date of the order, why he should not be disbarred, suspended, or otherwise disciplined as prayed for in the petition. The order shall further require that a copy thereof, together with a copy of the petition, be served on the respondent in a manner permitted by Rule 5 (b) of the Federal Rules of Civil Procedure, not less than ten days in advance of the date therein specified for showing cause.

(5) The judge to whom any proceeding hereunder is assigned may invite the other judge of the court to sit with him and participate in the proceeding.

(6) In all proceedings hereunder, written findings of fact and an order based thereon shall be filed.

(7) Except as otherwise provided in this rule, all proceedings hereunder shall be governed by the Federal Rules of Civil Procedure.

(8) Disciplinary proceedings under this rule shall not affect or be affected by any proceeding for contempt under Title 18 of the United States Code or under Rule 42 of the Federal Rules of Criminal Procedure.

LIBRARY
SUPREME COURT, U. S.

FILED
FEB 16 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 326

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST
HARRIET BOUSLOG SAWYER, *Petitioner*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL LAWYERS GUILD, AMICUS CURIAE, IN SUPPORT OF PETITIONER

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THE INTEREST OF THE NATIONAL LAWYERS GUILD

The National Lawyers Guild is a national bar association which throughout its history has supported the independence of the bar, the fair administration of justice, and the preservation of civil liberties for all. Many of its members, including the petitioner, have represented unpopular defendants, often at the risk of injury to their personal interests.

In the present case, petitioner has been suspended from the practice of law as an outgrowth of her representation of defendants in the Hawaii Smith Act case. We share the views of the dissent below that the suspension is founded upon "dubious evidence" (R. 599);

that it is unconstitutional (R. 600); that the judgment "serves notice on all lawyers everywhere to hold their tongues" (R. 605); and that petitioner has been disciplined "for conduct in connection with a case in the federal court which federal law holds proper". (R. 618). We are naturally concerned not only with the injustice done to a courageous lawyer, but with the effect and implications of the majority's novel holdings (1) that a territorial court (and by extension a state court) may discipline attorneys for conduct considered to infringe upon the administration of justice by a federal court, though not proceeded against by the latter; and (2) that a lawyer who appears in a case thereby loses the protection of the First Amendment during the pendency of the trial.

The proceeding against petitioner was initiated and carried through by the Hawaii Bar Association. It is appropriate that this Court have the benefit of the contrary views of another organized segment of the bar in a case involving the rights of lawyers.

ARGUMENT

I. The Suspension Order Interferes With the Administration of Justice by the District Court and Is Therefore Beyond the Power of the Territorial Court.

Petitioner has been ordered suspended from practicing law—for all practical purposes fully disbarred—for conduct considered to have been aggressions against the United States District Court for the District of Hawaii. As to petitioner's Honokaa speech, the Supreme Court of the Territory of Hawaii expressly found that this was "a wilful oral attack upon the administration of justice" in the federal court which "impugned the integrity" of the federal judge (R. 118). As to petitioner's interview of juror Fuller,

the theory of the territorial court was that this constituted an invasion of the privacy of the federal court's jury room (R. 120). The federal court itself, though by these findings primarily aggrieved, took no disciplinary action against petitioner.

We submit that the disbarment order was beyond the power of the territorial court because it was an interference by a legislative court with the administration of justice by a constitutional federal court.

1. By asserting the power to discipline attorneys for interrogating federal court jurors after verdict, the territorial court has foreclosed the federal court from receiving, and thus from acting upon, motions for new trials on account of conduct of jurors in the federal jury room. This would be an impermissible interference with the functioning of the federal court even if it adhered unqualifiedly to the familiar dogma that jurors may not impeach their verdict. For it would still be for that court to decide whether or when to relax that principle, to which it should not be forever committed by reason of a control exercised over it by the territorial court. In fact, however, the federal rule is that jurors' statements will be considered on new-trial motions and will under certain circumstances require setting aside a verdict.[1] Moreover, the territorial court's action excludes the federal court from access to information which could be valuable to it in devising methods to insure just verdicts, including the method and scope of the voir dire examination of jury panels and the formulation of jury instructions.

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[1] See authorities cited by the dissent below (R. 619). Apparently, the latest instance in which a federal court considered the sufficiency of a juror's statement—intimating no reproach of the person who obtained it—is *Klimes* v. *United States*, — F. 2d — (App. D. C., Jan. 26, 1959, No. 14659).

2. By asserting the power to discipline attorneys for commenting on the conduct of a federal court trial, the territorial court is limiting by its own standards, no matter how provincial, what the federal court and the public generally may hear about the operation of federal justice. This also derogates from the dignity of the federal court by making it appear to the public that the federal court is under a protective custody of the territorial court. Of course, the inhibition on criticism considered disrespectful inevitably suppresses other criticism as well.

Furthermore, if the territorial court is to act rationally and fairly in disciplining attorneys for remarks about the federal court—and any other kind of action would violate due process—it must embark into inquiries which inevitably intrude into the operations of the federal court and the conduct of the federal judge. For example, in order to determine whether the attorney was at fault and, if so, the seriousness of his offense, the territorial court obviously should consider whether his criticisms were true, whether they were provoked, whether they actually affected the trial, and whether he should have reasonably expected them to affect the trial.[2]

We suggest that these are the reasons, though inarticulated, which led Chief Justice Marshall to admit an attorney to the bar of this Court while refusing to inquire into the circumstances of his disbarment in

[2] For the relevancy of motive and mitigating circumstances in disbarment proceedings, see *Bradley* v. *Fisher*, 13 Wall. 335, 354. For the relevancy of judicial provocation in contempt proceedings, see *Offutt* v. *United States*, 348 U. S. 11, 12-13. For the relevancy of accuracy of comment in contempt proceedings, see *Pennekamp* v. *Florida*, 328 U. S. 331, 344-345.

another court for allegedly contemptuous conduct. *Ex Parte Tillinghast,* 4 Peters 108. Similarly, this Court long ago held that one court may not disbar an attorney as punishment for a contempt committed against another court. *Ex Parte Bradley,* 7 Wall. 364.

II. The Suspension Order Is Unconstitutional Because Its Grounds Do Not Support a Rational Finding That Petitioner Is Unfit to Practice Law and Because It Penalizes Expression Protected by the First Amendment.

Petitioner has been disbarred for reasons which do not rationally justify a finding that she is unfit to practice her profession and because she uttered constitutionally protected expression. The disbarment therefore violates due process of law and the First Amendment. *Schware* v. *Board of Bar Examiners,* 353 U. S. 232; *Konigsberg* v. *State Bar of California,* 353 U.S. 252; *Ex Parte Garland,* 4 Wall. 379.

1. Petitioner's post-verdict interview of a juror cannot be a valid ground for discipline because it was a legitimate exercise of her professional responsibility toward her clients. It is particularly deplorable, as well an unconstitutionally discriminatory, that an acknowledgedly common practice of the bar (R. 119) for the first time became an offense when it was adopted by an attorney representing unpopular defendants. It is hard to avoid the conclusion that petitioner's disbarment has its real roots in "atmospheric considerations" generated by her representation of the Smith Act defendants. (Cf. Jackson, J., in *Re Isserman,* 354 U. S. 286, 294.)

2. The Honokaa speech is likewise not a valid basis for finding unfitness. Petitioner is an attorney of hitherto unblemished reputation, who has courageously represented the underdogs in a semi-colonial society.

She appeared as counsel for defendants in a Smith Act conspiracy trial at a time of utmost public hostility against such defendants and against attorneys who dared to represent them. She became indignant—to many persons understandably and justifiably so—at the nature of the Smith Act, the prosecution's tactics and theories, the quality of the prosecution witnesses, the lafitude for the introduction of prosecution evidence, and the prejudicial environment. She had ample reason to apprehend a miscarriage of justice. In fact her clients were convicted at the trial even though the evidence was insufficient to prove guilt. *Fujimoto* v. *United States,* 251 F. 2d 342. And the traumatic effect of the extra-judicial pressures on juror Fuller and his account of the jury deliberations vividly establish that the jury did not and could not act dispassionately (R. 6-12). Petitioner spoke to a public meeting in a small town "in the island most distant" from the city of trial (R. 609). Her audience was mostly members of a union of which one of the defendants was an officer. It is understandable that the defendants, enveloped as they were by public animosity, were in dire need of some public support. Petitioner's speech was not an unreasoning diatribe. It gave reasons, explanation and examples, and sought to appeal to the intellect as well as to the audience's sense of fair play. There is neither a finding nor a suggestion that the speech had any influence on the jury. Any such supposition would, indeed, be ludicrous in view of the unremitting propaganda against Smith Act defendants and juror Fuller's description of the jurors' attitudes.

From petitioner's rather lengthy speech the Supreme Court of Hawaii culled five remarks which it consid-

ered gross misconduct (R. 117). Three of these remarks cannot, in context and with any degree of reason, be understood to involve criticism of the trial judge.[3] The other two remarks[4] (which were obviously addressed to all Smith Act trials and not just the *Fujimoto* case) can be taken to involve criticism of the trial judge only by drawing inferences which are not necessarily inherent in the ambiguous text and by disbelieving petitioner's own disclaimer of any intention to refer to Judge Wiig (R. 29). Even if the inference is made, it is still unreasonable to construe the remarks as reflecting on the integrity of the judge. Condemnation of a judge's rulings by no means disparages his character; otherwise the whole bar would be constantly personally embroiled with the whole bench.

By any unjaundiced and sophisticated view, petitioner's comments, even if they be interpreted to be critical of the trial judge's conduct of the proceeding, do not amount to very much. The cry that a trial judge is violating all the rules of evidence, thereby enabling the prosecution to make a case, can be heard in the corridors of almost any courthouse on almost any business day. Judge Chambers, the author of the ma-

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[3] These were: (1) the statement about "some rather shocking and horrible things that go on at the trial" (R. 574); (2) "there's no such thing as a fair trial in a Smith act case" (R. 577); (3) "unless we stop the Smith trial in its tracks here there will be a new crime, people will be charged with knowing what is included in books." (R. 577). The quotations are from the Matsuoka notes, which both the majority and the dissenters below accepted as the most accurate account available (R. 587, 592).

[4] (1) "all rules of evidence have to be scrapped or the government can't make a case" (R. 577); (2) "they just make up the rules as they go along" (R. 577).

jority opinion below, was just about as harsh, though more polished, when he wrote, "One may as well recognize that the Yates decision [*Yates* v. *United States,* 354 U. S. 298] leaves the Smith Act as to any further prosecution under it, a virtual shambles—unless the American Communist Party should witlessly set out to reconstitute itself with a new 'organization.'" *Fujimoto* v. *United States, supra:* And, of course, petitioner's remarks about the trial judge (if they were about the trial judge) pale into insignificance beside criticisms made of this Court in recent years by numerous lawyers, some of them in high station.

Under the circumstances, petitioner has been disbarred on the basis of an arbitrary construction of her speech and for trivial reasons which have no rational relationship to her fitness to practice law.

3. If petitioner's speech—or one much more vehement—had been uttered by anybody else, including some person or newspaper who might be expected to have a significant influence on the trial judge and jury, it would concededly have been within the area of the First Amendment and thus protected against sanctions. *Bridges* v. *California,* 314 U. S. 252; *Pennekamp* v. *Florida,* 328 U. S. 331; *Craig* v. *Harney,* 331 U. S. 367. It is impossible to understand why the speech is outside of the protected area and a legitimate basis for reprisal because it was uttered by petitioner. The design of the First Amendment is, after all, to guarantee the right of the people to hear. If they have a constitutional right to hear certain words spoken at a given time and place, it cannot be taken away from them because of the identity of the speaker.

The court below held that petitioner's speech was not protected by the First Amendment because petitioner

was counsel in the pending case. This is a statement of a conclusion for which no adequate support is given. The court reasoned that petitioner was a court officer "charged with the duty of keeping the temple clean" (R. 562). But this is an obligation with which all lawyers, as well as others, are charged, yet even the court below agreed that the speech would have been protected if made by a lawyer who was not in the case. Furthermore, petitioner cannot reasonably be found to have violated this duty in the absence of an inquiry into the truth of her remarks. Hiding the fact that a place is soiled is not the same as keeping it clean.

The fact that the litigation was pending is surely not adverse to petitioner. This Court has held that this circumstance only emphasizes the value of the constitutional protection, since the utterance may lose its timeliness and importance if delayed to the end of the case. *Bridges* v. *California, supra,* at 278; *Pennekamp* v. *Florida, supra,* at 346.

The concurring opinion below asserts that a lawyer surrenders his constitutional rights during a trial by entering his appearance (R. 588). No justification for this novel doctrine appears in the Constitution or in precedent. It is not responsive to any social need or essential to the administration of justice. It is fundamentally at odds with the purpose and text of the First Amendment, and is inconsistent with the function of the Amendment to protect the right of the public to be informed, rather than the right of individuals to say what they please. Nothing more clearly reveals the lack of substance in the concurrence's view than the inaptness of its "analogy"—that a lawyer must take his seat when the judge tells him to.

CONCLUSION

The decisions of the territorial court and the court below are "self-inflicted wounds" of our judicial system which jeopardize the independence of the bar and the right of the public to fearless representation. The judgment below should be reversed with a direction to dismiss the proceeding against petitioner.

Respectfully submitted,

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Q. Do you know who she meant by 'they'?

A. I believe she said 'we', meaning the speakers, like Mr. Hall.

Q. Do you remember her saying anything else?

A. Well, she said that the government could submit any evidence they liked at any time, and that they could also use books that might not have any bearing on the case.

Q. Is that the best of your recollection of what she said?

A. Well, she gave various examples of things, that I don't recall, that were going on, in what she called the horrifying, shocking trial.

Q. Did she use those words?

A. Yes.

Q. Horrifying and shocking?

A. Horrifying and shocking." (R. 184-185.)

Hall (Regional Director for ILWU, defendant in *Fujimoto* case). (O.B. 13.)

Additional and more complete excerpts from Mr. Hall's testimony.

"The Witness: . . . The second thing is the paragraph reading as follows: 'Mrs. Sawyer, speaking for a half hour, spoke of "some rather shocking and horrible things that go on at the trial" '. I made that statement, and I was referring to the fact that the judge was overruling a number of defense objections and permitting evidence of a hearsay nature that I had no prior knowledge of, and things of that nature." (R. 395.)

. . . . .

"Q. Did she talk about the testimony of Paul Crouch?

Office-Supreme Court, U.S.
FILED
APR 16 1959
JAMES R. BROWNING, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1958

No. 326

In the Matter of Disciplinary Proceedings against
HARRIET BOUSLOG SAWYER,
a Member of the Territorial Bar of the Territory of Hawaii,
Petitioner.

BRIEF OF RESPONDENT.

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MORIO OMORI,
Special Deputy Attorney General,
Territory of Hawaii,
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Attorneys for Respondent.

A. Yes, I think there was some reference to Mr. Crouch's testimony. He was galloping across the Steppes, something along that line, in a Red Army uniform. All that was supposed to be evidence against Jack Hall." (R. 404.)

. . . . .

"Q. Did she speak of the conflicting testimony of the same witness in the Smith Act trial and in previous hearings?

A. Yes, I think so." (R. 405.)

. . . . .

"Q. Did she say anything to the effect, and I am quoting, 'On cross-examination Johnson said he did not tell the names of the books but just showed Jack Hall the duffel bag. So Jack Hall violated the Smith Act because he saw a duffel bag with some books on overthrowing the government in it. It's silly. Why does the government use your money and mine to put people in jail for thoughts?' Did she say anything like that?

A. Something like that. I don't remember putting Jack Hall in jail for thoughts, but there was something about duffel bag evidence." (R. 406.)

Petitioner: (O.B. 14-15.)

Additional and more complete excerpts from petitioner's testimony:

"A. I recall telling four factual things that had happened in the Smith Act trial up to that point.

Q. In other words, you related Crouch's testimony in your——

A. I summarized Mr. Crouch's testimony.

Q. You summarized Mr. Crouch's testimony?

A. Extremely briefly.

Q. In order to show the people present what kind of testimony was going on at the trial?

A. Yes.

Q. And you summarized Johnson's testimony with the same view?

A. Yes."

. . . . .

"Q. Did you make this statement: 'Mr. Johnson said he did not tell the names of the books, but just showed Jack Hall the duffel bag; so Jack Hall violated the Smith Act because he saw a duffel bag with some books on overthrowing the government in it. It's silly. Why does the government use your money and mine to put people in jail for thoughts?'

A. I made no statement in those words or any words approximating that, Mr. Barlow.

Q. This doesn't reflect at all what your statement was on that occasion, is that right?

A. It sounds to me like Mr. Matsuoka—I did make a statement concerning Mr. Johnson showing Mr. Hall a duffel bag containing books and I explained on the basis of Mr. Hall's having seen the duffel bag, the books contained in the duffel bag had been admitted into evidence.

Q. You criticized that admission?

A. I did not criticize it. I merely stated the fact that it had been—that that had happened." (R. 454-455.)

"The Witness. Those are not my words. The substance, the fact that I was in the Majors-Palakiko case—that in that case the Supreme Court of the Territory had refused to permit Mrs. Hughes' testimony; that Vernon Stevens had told

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Appendix.

The Chairman. You don't feel at this time that you can deny that you said it? You say you have no recollection. And that's the same testimony you gave before. But some of the Committee felt that you had not absolutely denied that you said it.

The Witness. Well, this is—I would like to say this to the Committee. I have absolutely now no independent recollection of what I said at Honokaa. I feel that the things—I tried to the very best of my ability, as an officer of the Court, to tell Judge Wiig everything I had said in context and to explain to him. For me to say now, two years later, something I didn't say to Judge Wiig, I really can't do it honestly. So I feel that what I intended to say to Judge Wiig at the time was—here is what I said—and I didn't say the things that this newspaper reporter attributed to me in the way that they were said. But I don't want now to say to this Committee something I did not say to Judge Wiig two years ago—or more than two years ago—because I have no present recollection.

Mr. Anthony. Mr. Chairman, we agree that the witness [Bouslog] will not deny having made the statement now as a result of this colloquy." (R. 527-528.)

Much of the selected excerpts of the testimony presented by petitioner in the opening brief, her attempted explanation of the speech to Judge Wiig, and the reconstruction of petitioner's speech by her counsel in the opening brief seem designed to engender the main theory of her case that she was explaining the Smith Act in general terms and laymen's

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here in Honolulu. Now, let's not fool ourselves about that. We're lawyers here." (R. 525-526.)

The Genesis of the Charges.

Petitioner implies some collusion in the amendment of the Supreme Court rules which she maintains the bar association "devised" to permit the bar association to file such complaints, after the attorney general took no action. (O.B. 18.) This charge is ridiculous. Rules of the Supreme Court are revised periodically and only under the authority of the Court, not the bar association. Petitioner compliments herself too much in stating that the amendment of the rules which are applicable to all members of the bar was "devised" for her own and personal detriment.

Petitioner's Professional Record.

Respondent merely points out that many members of the Bar Association of Hawaii, the complainant, have nobly observed their lawyer's creed and have fought for the so-called "little people" and the "working people" and the "non-haoles" in the Hawaiian community. Petitioner has served at focal points of social and economic conflict in her community. So have many of the other members of the bar. But this is beside the point. No finger is being pointed at petitioner because she has contributed to "government at law" by challenging the status quo and by representing the "little people" and "victims of public passion and prejudice." (O.B. 23.) She is being proceeded against for what the Ethics Committee and the two courts below have found to be gross miscon-

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tution, laws or treaties of the United States. The right to practice law in the courts of the Territory of Hawaii is not such a right or privilege. As discussed in Point III B, *infra,* no freedom of speech rights was involved.

No rights of due process were infringed. As to disbarment, due process requires only that an attorney have reasonable notice of the charges against him and a reasonable opportunity to be heard in his defense. The record is replete with the care and consideration used at every turn by the disciplining court to accord petitioner with every opportunity to present her case. In fact, no allegation to the contrary is made. Petitioner was represented by eminent counsel from the outset, apprised of all charges against her, given a protracted hearing with free and full exercise of her rights of confrontation, presentation of testimony, examination and cross-examination of witnesses, and accorded an opportunity for a *de novo* hearing and much leeway to present her defense and to file motions and demands of various forms in time and number. As discussed in Point III A, *infra,* no due process rights were violated.

2. The power to discipline for misconduct of an attorney is incidental to the local licensing authority. The judgment herein suspended petitioner from practice in the territorial courts only and created a standard of conduct that affects her license to practice in the territorial courts only. It does not interfere with the administration of justice in the federal courts. The territorial court, as the jurisdiction primarily respon-

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OCTOBER TERM, 1958

No. 326

In the Matter of Disciplinary Proceedings against
HARRIET BOUSLOG SAWYER,
a Member of the Territorial Bar of the Territory of Hawaii,
Petitioner.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

The Judgment and Its Effect.

Under Rule 15(d) of the Rules of the Supreme Court of the Territory of Hawaii (O.B. 84, App.), it is true that an attorney suspended for more than six months must apply for admission and satisfy the court as to good moral character and requisite legal learning. (O.B. 2, n. 2.) But a suspension for more than six months does not carry with it the gravity of a disbarment in that the reapplication after such sus-

pension would be as a matter of right after the expiration of the period of suspension. The same cannot be said for a disbarment.

The Proceeding in the Territorial Court.

A more detailed, chronological account of the proceedings than that presented by petitioner in this section (O.B. 6) is presented *infra* in Point I, B, 2 at p. 30.

The Evidence and the Findings—the Honokaa Speech.

Petitioner, in her version of the statement of the evidence, attempts to summarize the notes of the news reporter Matsuoka and embellishes the summary with pointed references to what petitioner, in retrospect, insists she was talking about. Thereafter, she recites incomplete portions of the testimony of witnesses at the hearing (O.B. 10-14) and then interprets her own statements and testimony into a total framework of innocence. (O.B. 14-16.)

The reporter Matsuoka's notes are set out *in haec verba* (R. 593-595) and require no summarization. They speak for themselves. Moreover, a fair statement of the case, it is respectfully submitted, cannot, in all good conscience, be presented without a consideration of all the testimony and evidence taken in toto to form a complete picture. It cannot be done by overemphasizing petitioner's self-serving attempt to explain away her speech in an equivocal manner, and, in the words of petitioner, in "an excess of Lawyer's caution." (R. 438.) It cannot be done by taking

arbitrariness in the findings below as to offend due process.

There is no violation of petitioner's freedom of speech rights. Membership in the bar is a privilege burdened with conditions. The restraints imposed did not overreach the bounds of protected speech. The clear and present danger test has no application. It may be a formulary and a frame of reference. But to follow it studiously and stolidly would be to emasculate the canons of ethics and the reasonable common law rules of behavior of attorneys. Contempt for the reasonable rules and canons of behavior cannot be equated with courage and insults to the integrity of the judge and judicial processes cannot be equated with independence.

The findings on the Fuller affidavit are supported by the evidence and by applicable law. Petitioner's affidavit, together with testimony of her own witnesses, establishes beyond question that petitioner's conduct merits stern censure. Her searching and pointed interrogation of a juror who was obviously in poor physical and mental state and filing an affidavit without disclosing all of the circumstances amounted to gross misconduct. This was not an interrogation to inquire into the mental imbalance of the juror during the trial and before verdict.

isolated excerpts from Matsuoka's notes and incomplete excerpts from witnesses' testimony.

It is uncontroverted, as stated in the opening brief, that petitioner made the speech while counsel for certain respondents in the *Fujimoto* case then at trial before Judge Jon Wiig, United States District Court Judge for the District of Hawaii, which is the gravamen of the first charge in the complaint. (O.B. 7.) It is also uncontroverted that the meeting at which the speech was made by petitioner was held under the auspices of a defense committee of the ILWU (R. 410) which had been set up to raise money to aid the defense of Jack Hall, one of the defendants in the *Fujimoto* case, and any other union member in similar prosecutions. (R. 401-402.)

The reporter Matsuoka's notes need no explanation in the statement of the case. The colloquy between Judge Wiig and petitioner is also reproduced in full (R. 22-23) and need not have been re-explained and interpreted by counsel for petitioner. (O.B. 15-16.)

The following are additions to petitioner's selected excerpts of the testimony and are necessary to present all of the pertinent facts which should, in all fairness, be brought to the attention of this Court.

Matsuoka (newspaper reporter, Hilo Tribune Herald). (O.B. 10.)

The portion of Mr. Matsuoka's testimony quoted by petitioner contains some ellipses denoting a deletion. The question asked and the words deleted by petitioner at the beginning of the quotation are:

"Q. Be more specific, as to what trial you are referring to.

A. The Smith Act trial, that was under way in Honolulu."

(Then follows what is quoted by petitioner.) (R. 150-151.)

John D. Morse (Industrial Relations Director, Honokaa Sugar Company). (O.B. 11.)

The following pertinent portion of Mr. Morse's testimony should not have been excluded from the quotations on page 11 of the opening brief:

"Q. Search your memory, Mr. Morse, and try to tell the Committee everything that Mrs. Bouslog said.

A. Well, she referred quite often to the trial in Honolulu, and about the difference—about the evidence that was brought up against the seven persons who are on trial, and how trying it was, that it had been going on for days, and that is about all I can recall." (R. 166.)

And further, Mr. Morse's testimony referred to the names of the same persons whose names were being mentioned in the *Fujimoto* case then at trial:

"Q. Did she mention a person by the name of Henry Johnson?

A. She did.

Q. Did she mention a person by the name of Jack Hall?

A. She did.

Q. Did she mention a person by the name of Paul Crouch?

A. I don't recall." (R. 167.)

and costs." June 25, 1948, c. 648, 62 Stat. 929, 28 U.S.C., sec. 1293.

A. The jurisdictional element of a controversy involving $5,000 in value, exclusive of interest and costs, was not met in the case at bar.

The pecuniary limitation on the jurisdiction of the federal courts is rigidly observed and cannot be waived.

Ever since the Judiciary Act of 1789, the necessity of establishing the jurisdictional amount has been scrupulously observed by the courts. The leading case of *Barry v. Mercein,* 46 U.S. (5 How.) 103 (1846), involved a petition for writ of habeas corpus whereby petitioner sought control of his daughter then in the custody of his estranged wife. The Act of 1789, 1 Stat. 84, c. 20, sec. 22, permitted the Supreme Court to review final judgments of the circuit courts when the matter in dispute exceeded $2,000. Chief Justice Taney pointed out that the Supreme Court had only such appellate jurisdiction as was conferred upon it by act of Congress. Construing the act, he held that

> "The words of the Act of Congress are plain and unambiguous. They give the right of revision in those cases only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated, in the ordinary mode of a business transaction. There are no words in the law which, by any just interpretation, can be held to extend the appellate jurisdiction beyond these limits, and authorize us to take cognizance of cases to which no test of money value can be applied." *Id.* at 120.

Olival (Women's Editor, Hilo Tribune Herald). (O.B. 12.)

Petitioner's selection of excerpts from Mrs. Thelma Olival's testimony stops short immediately before the following colloquy:

"Q. Now what trial was she referring to?

A. To the Jack Hall trial.

Q. Do you know where that trial was being held?

A. In Honolulu here.

Q. There is no doubt in your mind that she was referring to that trial?

A. Oh, yes, she was referring to it." (R. 172.)

Ramos (Clerk, Honokaa Sugar Company). (O.B. 12.)

Additional excerpts:

"A. Well, it was a general speech. She had no notes. She just came out and spoke, and I recall her saying that there was no fair trial in the Smith Act case." (R. 178-179.)

Phyllis P. Morse (wife of John D. Morse). (O.B. 13.)

Complete pertinent excerpts of Mrs. Morse's testimony left out from petitioner's statement of the evidence:

"A. I believe that she said that there was no such thing as a fair trial under the present Smith Act case in Honolulu, and that the newspapers were not giving a full account, a true account, and that from time to time they and we would be coming to the various islands to acquaint a group with the true facts.

In *Perreine v. Slack,* 164 U.S. 452 (1896), this Court held that a controversy between the mother and the testamentary guardian of infant children, each claiming the right to have custody and care, was a matter of "such a nature as to be incapable of being reduced to any pecuniary standard of value." *Id.* at 454.

In *Simms v. Simms,* 175 U.S. 162 (1899), this Court again held that it could not review an appeal from a divorce decree of the Supreme Court of the Territory of Arizona since the matter was not one of value which could be estimated in money.[2]

Upon the foregoing authorities, it is respectfully submitted that the petitioner did not and could not meet the jurisdictional requisite of a case involving a matter the value of which was capable of being reduced to any pecuniary standard of value.

Petitioner, by her affidavit, sought to establish that the value of her share in the law partnership of Bouslog and Symonds exceeds the sum of $5,000 exclusive of interests and costs and that her annual net income has always exceeded said sum. (R. 622.) However, neither the value of the law partnership nor her annual income is the matter in dispute; the privilege of appellant to hold a license and continue in the prac-

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[2]Accord: *In re Red Cross Line,* 277 Fed. 853 (S.D. N.Y. 1921). (Action for specific performance of arbitration does not draw jurisdictional amount from claim to be arbitrated. Amount involved nominal.) *Carroll v. Somervell,* 116 F.2d 918 (2 Cir. 1941). (Matters not susceptible of pecuniary valuation arising out of alleged wrongful discharge.)

B. The jurisdictional element of a case involving the Constitution, laws or treaties of the United States or any authority exercised thereunder was not met in the case at bar.

1. The right to practice law in the courts of the Territory of Hawaii is not a right or privilege protected by the Constitution, laws or treaties of the United States.

The jurisdictional requirement that an appeal from a final decision of the Supreme Court of Hawaii be from a case involving the Constitution, laws or treaties of the United States in 28 U.S.C., sec. 1293, does not differ from the similar jurisdictional requirement of 28 U.S.C., sec. 1257(3) where an appeal from a state court to the Supreme Court of the United States is concerned. *Iglesias Costas v. Secretary of Finance,* 220 F.2d 651, 653 (1. Cir. 1955).

The right of appeal herein, therefore, must be predicated upon a denial of a title, right, privilege or immunity of a nature protected by the Constitution, laws or treaties of the United States.

At the outset, it should be made clear that the Hawaiian Organic Act should not be considered a federal statute for purposes of jurisdiction. See *Puerto Rico v. Rubert Co.,* 309 U.S. 543, 550 (1940); *American Security v. District of Columbia,* 224 U.S. 491 (1912); *Arroyo v. Puerto Rico Transportation Authority,* 164 F.2d 748 (1 Cir. 1947). In *Alesna v. Rice,* 172 F.2d 176 (9 Cir. 1949), the court held that the Hawaiian Organic Act (48 U.S.C. secs. 642, 645) places the courts of Hawaii in the same position in relation to the federal judicial system as state courts.

And where the Organic Act is concerned with local policy, it is a local law over which federal courts

her that he had beaten Palakiko was not permitted by the Supreme Court; whereas in the Smith Act cases in general, as well as in this Smith Act case, people who had been many years away and had never seen this defendant were permitted to testify.

Mr. Barlow. In other words, would it be fair to say that you paralleled that with the phrase that Mr. Matsuoka attributes to you: 'With the same situation, a Federal judge, sitting on a Federal Bench, permits Crouch to testify about 27 years ago what was said then'?

The Witness. I used the Palakiko-Majors case as a contrast to Mr. Crouch's testimony and the hearsay testimony in the conspiracy case.

Q. That Judge Wiig was allowing the present Smith Act case, is that right?

A. The motions hadn't been argued yet.

Q. No, but that Judge Wiig was allowing in the present Smith Act case?

A. Yes, he was.

Q. That is what you were critical about? Is that right?

A. I was reporting. I left that to the audience.

Q. Were you reporting to your client or to whom?

A. By 'reporting', I meant relating.

Q. You were relating what was going on in the pending Smith Act case right?

A. I related what Mr. Crouch—the summary of Mr. Crouch's testimony, yes, Mr. Barlow.

Q. And you contrasted that with the Palakiko-Majors case?

A. I contrasted the use of hearsay testimony in the Majors-Palakiko case where life was involved, in contrast to the Smith Act case where

27-year-old testimony was being permitted." (R. 457-458.)

"Q. But you did say there was no such thing as a fair trial in the Smith Act case?

A. In the Smith Act case, yes." (R. 459.)

. . . . .

"The Chairman. We had one other question. I think we had quite a discussion the other day about an equivocal denial, and so forth, and some of the Committee, in discussing the matter, wanted to know whether or not the one statement that seems to be attributed now, at least, by Jack Hall to himself, but which is set forth in Exhibit 1—whether or not you did or you did not make the statement—and that is, according to this exhibit: 'She said she wanted to tell about some rather shocking and horrible things that go on in the trial.'

The Witness. I told Judge Wiig I have no recollection, and I have no present recollection of having made that. I reconstructed the entire speech and I told Judge Wiig everything I could remember that I said and that I had no recollection of ever having said.

The Chairman. But you wouldn't be able to absolutely deny that you said it? You have no recollection—and you had no recollection at that——

The Witness. Immediately afterwards I had absolutely no recollection although I recreated the whole speech, and Judge Wiig was asking me after I had told him everything I did say—certain things, and I have no recollection of making that at any time. It doesn't sound like my language.

should not take direct jurisdiction. *Puerto Rico v. Rubert Co., supra.* See also *National Bank v. County of Yankton*, 101 U.S. 129, 133 (1879); *Laguana v. Ansell*, 102 F.Supp. 919 (D. Guam 1952), aff'd per curiam, 212 F.2d 207 (9 Cir. 1954); *Guam v. Kaanehe*, 137 F.Supp. 189 (D. Guam 1956).

The petitioner consequently must show that her privilege to practice law is a privilege guaranteed by the Constitution, treaties or statutes of the United States which is protected by a federal court, before the court below can take jurisdiction.

It is an accepted rule that:

> "The privilege of practicing law is not a vested or a constitutional right. In re Cloud (Iowa) 250 N.W. 160, 163. It is a privilege burdened with the condition that the possessor of it remains a fit and safe person to exercise it. State v. Peck, 88 Conn. 447, 91 A. 274, 275, L.R.A. 1915A, 663. Ann. Cas. 1917B, 227; People ex rel Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487, 60 A.L.R. 851, 855. Proceedings for disbarment do not come within the due process clause (Amendment 14), or the provisions for a trial by jury (article 3, § 2, subd. 3; Amend. 6) of the Federal Constitution. Ex parte Wall, 107 U.S. 265, 288, 289, 2 S.Ct. 569, 27 L.Ed. 552, 561, 562; In re Cloud, supra." *In re Haddad*, 106 Vt. 222, 173 A. 103, 104 (1934).

The Supreme Court of Hawaii has also stated that:

> "A license to practice law does not confer upon the licensee a vested or absolute right but a privilege or franchise which may be terminated by the court granting it for malpractice, nonpayment of moneys collected by him for private parties, or

for any deceit, or other gross misconduct. (See R.L. 1935, § 3614)." *In re Henriques*, 34 Haw. 348, 351 (1937).

The right to practice law is also not a property right. *In re Thatcher*, 190 Fed. 969 (D. Ohio 1911); *Ayres v. Hadaway*, 303 Mich. 589, 6 N.W.2d 905 (1942); *Emmons v. Smitt*, 58 F.Supp. 869 (D. Mich. 1944).

It was also early held by this Court in *Bradwell v. The State*, 16 Wall. 130 (1873) that the right to practice law in a state court is not a privilege or immunity protected by the federal courts. In answer to the contention that the right to practice law was one of the rights which the state was prohibited from denying by the Federal Constitution, this Court stated:

"In this latter proposition we are not able to concur with counsel. We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them. This right in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any State, or in any case, to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the State and Federal courts, who were not citizens of the United States or of any State. But, on whatever basis this right may be placed, so far as it can have any relation to citizenship at all, it would seem that, as to the courts of a

language and was not referring to the Smith Act case at trial in Honolulu in which she was one of counsel. In this connection, it would seem that the forthright honesty and candid observation of Mr. J. Garner Anthony, an experienced attorney and then counsel for petitioner, deserve some notice in the statement of the evidence and findings of this case, to wit:

> "Q. (By Mr. Dodge, a member of the Ethics Committee.) I have a couple of other questions on this Honokaa thing. You stated, I think on Monday, that you did not criticize Judge Wiig's ruling as such in the speech that you made, but rather that you left that conclusion to the audience.
>
> A. [Mrs. Bouslog]. Yes.
>
> Q. And in view of that and in view of the audience you were talking to, was there any doubt in your mind as to what conclusions that audience would draw from your remark?
>
> . . . . .
>
> Mr. Peters (A member of the Ethics Committee). . . . He's asking Mrs. Bouslog whether or not the camouflage relative to generality was calculated to be applied specifically to Brother Wiig. That's all he is asking. Do I understand your question?
>
> Mr. Anthony. That is a question the Prosecutor ought to ask.
>
> The Chairman. I think the question is proper.
>
> Mr. Anthony. I will say to the Committee right now—I have read these speeches and I would agree with the conclusion implicit in Mr. Dodge's question; namely that this was a talk about what was going on in the Smith Act trial

duct in engaging and participating in a wilful oral attack upon the administration of justice, in impugning the integrity of a presiding judge in a pending case and in making "studied inquiries" and "searching or pointed examination" of a physically and mentally ill juror.

SUMMARY OF ARGUMENT.

1. The court below had no jurisdiction over the local disciplinary proceeding involved. The jurisdictional elements of the appellate review statute applicable to the territorial court were not met.

This cause does not involve a controversy involving $5,000 in value, exclusive of interest and costs. A lawyer's license to practice law is not a claim, cause of action, privilege or right that can be reduced to a pecuniary standard. It has no measure in money. The pecuniary limitation of the applicable jurisdictional statute is and should have been rigidly observed. It is true that such strict adherence smacks of arbitrariness, but a right can be priceless and have no measure in money. To rule otherwise would make a shambles of the jurisdictional statute.

This cause did not meet the jurisdictional element of a case involving the Constitution, laws or treaties of the United States or any authority exercised thereunder. The right of appeal to the United States Court of Appeals from the Supreme Court of the Territory of Hawaii must be predicated upon a denial of a title, right, privilege or immunity protected by the Consti-

sible for petitioner's conduct, applied its own standard of conduct and made its own determination after exhaustive hearings. It judged petitioner by standards of conduct applicable to members of its own bar. These local standards are applicable to actions in or out of court and in all courts, local, state, or federal. The court merely followed the recognized rule that if an attorney admitted to its bar commits acts in reference to federal court litigation which reflect on his fitness to enjoy the rights and privileges of an attorney in the local court, proceedings may be taken against him in the local court. It merely exercised its recognized autonomous control over the conduct of members of its bar.

3. The findings of the courts below are rationally supported by the evidence. The record below was made after a full and exhaustive hearing. Petitioner was represented by counsel below and had every opportunity to contradict, rebut, amplify, or otherwise attack the testimony and evidence adduced. But as the court below found of great significance, she did not produce a single member of the sympathetic and predominantly ILWU audience to confirm her version of the Honokaa speech. Her Fuller affidavit, on its face, supports the findings below. The testimony on the Fuller affidavit reaffirms said findings. The testimony and evidence cannot be glossed over by deft interweaving of her version of the testimony and evidence and by overly dissecting what actually was said into what she meant to say. It is for what she said and not what she meant to say that she is being disciplined. There is no

ARGUMENT.

I.

THE COURT BELOW HAD NO JURISDICTION OVER THE CASE AT BAR.

It is fundamental that the jurisdiction of a court, appellate or original, is always a preliminary question. See *Minnesota v. Hitchcock,* 185 U.S. 373 (1902); *Industrial Addition Association v. Commissioner of Internal Revenue,* 323 U.S. 310 (1945). Respondent has raised the question of jurisdiction of the court below and again challenges the assumption of jurisdiction by the court below.[1]

An appeal from the final decision of the Supreme Court of the Territory of Hawaii may be taken to the United States Court of Appeals for the Ninth Circuit only if the jurisdictional elements of 28 U.S.C., sec. 1293, are met. The statute conferring jurisdiction on the lower court to review final judgments of the Supreme Court of the Territory of Hawaii provides:

> "Final decision of Puerto Rico and Hawaii Supreme Courts. The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest

[1] Jurisdiction was first questioned in the court below on petitioner's motion for stay pending appeal. See per curiam opinion assuming jurisdiction, Lemmon, Circuit Judge, dissenting. (R. 623-628.)

The claim for custody was incapable of being reduced to any pecuniary standard and the writ of error was dismissed.

The court below reached the same result in *Sumi v. Young,* 83 F.2d 752 (9 Cir. 1936), aff'd. 300 U.S. 251 (1937), involving an appeal from the United States District Court of Alaska.

In *DeKrafft v. Barney,* 2 Black 704 (1862), a family dispute as to who should be guardian of a minor was held to be a right which could not be measured in money and the appeal dismissed accordingly for want of jurisdiction.

The same rule was applied in cases appealed from the highest court of a territory. *Potts v. Chumasero,* 2 Otto (92 U.S.) 358 (1875) involved an appeal from the Supreme Court of the Territory of Montana, challenging a change in the seat of government. In dismissing the appeal, the court stated that "the matter in dispute must be money or some right, the value of which in money can be calculated and ascertained." *Id.* at 361.

Again in *Youngstown Bank v. Hughes,* 106 U.S. 523 (1882), this Court held that it had no jurisdiction to review a suit to enjoin a county auditor from compelling the cashier to deliver the books of the bank, since the value of the matter in dispute was not ascertainable in money. It stated that "The present suit is not for money, nor for anything the value of which can be measured by money." *Id.* at 524.

tice of law is involved herein and nothing else. See *Abadie v. United States,* 149 U.S. 261 (1893). Such a privilege might be priceless, but has no measure in money. As stated in *Town of Elgin v. Marshall,* 106 U.S. 578 (1882):

> "The rule, it is true, is an arbitrary one, as it is based upon a fixed amount, representing pecuniary value, and, for that reason, excludes the jurisdiction of this court, in cases which involve rights that, because they are priceless, have no measure in money. Lee v. Lee, 8 Pet. 44; Barry v. etc. constructions." *Id.* at 580.

Mr. Justice Stone, in construing a substantially similar statute in *Healy v. Ratta,* 292 U.S. 263, 270 (1934), stated:

> "The policy of the statute calls for its strict construction . . . Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."

The "value in controversy" has reference "to the matter which is directly in dispute in the particular cause in which the judgment or decrees sought to be reviewed has been rendered . . ." *Town of Elgin v. Marshall, supra* at 570-80.

It is also well settled that the burden of proving jurisdictional amount is upon the petitioner. *De La Torre v. National City Bank,* 110 F.2d 381 (1 Cir. 1939); *Maldonado v. Savings and Loan Fund Ass'n,* 222 F.2d 78 (1 Cir. 1955).

State, it would relate to citizenship of the State, and as to Federal courts, it would relate to citizenship of the United States.

"The opinion just delivered in the *Slaughter-House Cases* renders elaborate argument in the present case unnecessary; for, unless we are wholly and radically mistaken in the principles on which those cases are decided, the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license." *Id.* at 139.

In re Lockwood, 154 U.S. 116, 117 (1894) explains this proposition thusly:

"In *Bradwell v. The State*, 16 Wall. 130, it was held that the right to practise law in the state courts was not a privilege or immunity of a citizen of the United States; that the right to control and regulate the granting of license to practise law in the courts of a State is one of those powers that was not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license."

It is fundamental that "No rights can be acquired under the Constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure." *United States*

v. Cruikshank, 92 U.S. 542, 551 (1875); *Duncan v. Missouri*, 152 U.S. 372 (1893). Any principle that the federal government should have the power to regulate the rights, privileges and immunities of the citizens of a state would fetter and degrade state governments by subjecting them to the control of Congress and would change the old theory of the relations of the state and national governments. The *Slaughter-House Cases*, 16 Wall. 36, 74 (1872).

That this policy is directly applicable to disciplinary proceedings against attorneys of a state bar is shown in *Keeley v. Evans*, 271 F. 520, 522 (D. Ore. 1921).

> "It is beyond question that this, a federal court, has no power or authority to review, re-examine, or reverse the action of the State Supreme Court in denying a license to practice law in the state. The United States Supreme Court has so declared as to its own authority to re-examine or reverse, as a reviewing body, the action of a state court in disbarring a member of the bar of its own court. Selling v. Radford, 243 U.S. 46, 50, 37 S.Ct. 377, 61 L.Ed. 585, Ann. Cas. 1917D, 569. If that court has no such authority, it follows, by a much stronger reason, that this court possesses none.
>
> "Nor can this court interpose to give complainant affirmative relief, such as to require the Supreme Court of the state to issue him a license to practice law in the state. This follows by reason of the distinct organization of the two courts, one being national and the other state, between which there is no jurisdictional co-ordination as it respects the administration of state policy. A federal court will administer the laws of the state in controversies in which it is given jurisdiction,

but it will not interpose to direct or review the administration of state affairs."

In view of the foregoing principles, it was correctly held in *Emmons v. Smitt*, 149 F.2d 869 (6 Cir. 1945) that a federal court had no jurisdiction to enjoin the State Bar of Michigan and members of its Grievance Committee from continuing with a pending State Bar proceeding against plaintiff. The court stated:

> "We search in vain for a basis for jurisdiction of the District Court over plaintiff's action, in so far as it seeks to secure to him the right to practice his profession. The claim that it is found in subsection (14) of Sec. 41, 28 U.S.C.A. (Suits to redress deprivation of civil rights) is without merit, since plaintiff's right to practice law is not secured to him by the Constitution nor by any law of the United States. It is not a property right but a privilege granted by the State of Michigan. Ayres v. Hadaway, 303 Mich. 589, 6. N.W.2d 905; see also Bradwell v. State of Illinois, 16 Wall. 130, 21 L.Ed. 442; In re Lockwood, 154 U.S. 116, 14 S.Ct. 1082, 38 L.Ed. 929; In re Thatcher, D.C., 190 F. 969, 975." *Id.* at 872.

And as stated by the lower court in that case, "We cannot under the guise of 'constitutional rights violated' act as an appeal court under the Supreme Court of Michigan." 58 F.Supp. 869, 875 (1944).

In *Green v. Elbert, et al.*, 63 Fed. 308 (1894), plaintiff was disbarred from practicing in the courts of the state of Colorado. He brought action for damages in the federal district court against the judges of the Supreme Court of Colorado alleging that there was

no cause for disbarment and that the judgment of disbarment was a result of a conspiracy among the defendants. The court, in affirming the judgment of the federal district court dismissing the complaint for want of jurisdiction, stated:

> "It is contended that the subject-matter of the action is such as to give the circuit court jurisdiction . . . The judgment of disbarment in the state courts did not affect the right of the plaintiff to practice in the courts of the United States. The plaintiff derived his right to practice law in the state courts from the constitution and laws of the state, and not from the constitution and laws of the United States; and any invasion of this right through a conspiracy or otherwise was an invasion of his right as a citizen of the state, for which he must seek redress in the state courts in the absence of the requisite diverse citizenship, which alone could give the federal court jurisdiction. . . ."
>
> "A conspiracy to deprive a lawyer of his right to practice law in a state court is not a conspiracy to interfere with any right or privilege granted, secured, or protected by the constitution or laws of the United States. . . . It makes no difference that the judgment of disbarment in the state court was granted for what the plaintiff had said or done in the United States circuit court. The proceeding in the state court did not purport to interfere, and did not interfere, with the right of the plaintiff to practice law in the courts of the United States or with his prosecution of the case in which he made the allegations which were the groundwork of the proceedings for his disbarment in the state court. The judgment of the

court below dismissing the complaint for want of jurisdiction is affirmed." *Id.* at 308 and 309.

The rule enunciated in the *Bradwell* and *Lockwood* cases was accepted by the lower court in *Mitchell v. Greenough*, 100 F.2d 184, 185 (9 Cir. 1938):

> "We pause here to observe that the right to practice law in the state court has been held by the Supreme Court not to be a privilege granted by the Federal Constitution or laws. Bradwell v. State of Illinois, 16 Wall. 130, 21 L.Ed. 442; Ex parte Lockwood, 154 U.S. 116, 14 S.Ct. 1082, 38 L.Ed. 929. In Green v. Elbert, 8 Cir., 63 F. 308, the Circuit Court of Appeals held that the conspiracy to deprive a lawyer of his right to practice law in the state courts was not a conspiracy to interfere with any right or privilege 'granted, secured or protected by the Constitution of the United States.'"

The court took jurisdiction of the case pursuant to a federal statute not involved herein but dismissed it on the ground, *inter alia*, that the complaint did not state a cause of action in that there was no denial of due process.[3]

2. There was no denial of due process.

Petitioner has doggedly attempted to raise "substantial" questions of law based upon the contention that due process of law was not accorded her, in contravention of the First and Fifth Amendments to the Constitution of the United States.

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[3]No constitutional question of freedom of speech and due process rights was involved. See discussion of these points in Point II B and C, *infra*.

Respondent submits that "As to disbarment, due process requires only that an attorney have reasonable notice of the charges against him and a reasonable opportunity to be heard in his defense. *Ex parte Wall*, 107 U.S. 265, 271; *Selling v. Radford*, 243 U.S. 46, 51. The form of notice and the form and manner of hearing are left to the sound discretion of the court. *Montgomery Co. Bar Ass'n v. Rinalducci*, 329 Pa. 296, 197 A. 924." *Phipps v. Wilson*, 186 F.2d 748, 751 (7 Cir. 1951).

The court in the *Phipps* case further stated:

> "As the amended complaint shows that plaintiff was apprized of the charges filed against him, and that he had a reasonable opportunity to defend thereagainst, the procedure complained against did not violate a scheme of ordered liberty or a deep rooted principle of justice. In other words, we find that plaintiff was not denied federal due process of law.
>
> "Neither the propriety of the designation by the Supreme Court of Illinois of committees of the Chicago Bar Association to act as commissioners in disciplinary proceedings, nor the claim that such committees were prejudiced against the plaintiff herein raises a substantial federal question." *Id.* at 752.[4]

There is no allegation that petitioner was denied a fair hearing. To the contrary, the detailed recital of the painstaking procedures taken to protect petitioner's right to a fair hearing, wherever such recital

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[4]To the same effect, see *Randall v. Brigham*, 7 Wall. 523; *In re Henriques*, 34 Haw. 348 (1937); *In re Collins*, 188 Cal. 701, 206 Pac. 990, 993 (1922); *In re Ulmer*, 268 Mass. 373, 167 N.E. 749, 755-756 (1929).

appears of record and with which petitioner takes no issue,[5] bears ample evidence that she was accorded due process of law that satisfied every constitutional requirement. See *Bute v. Illinois*, 333 U.S. 640, 648 (1948), quoting from *Powell v. Alabama*, 287 U.S. 45 (1932), *Hebert v. Louisiana*, 272 U.S. 312 (1926); *Holden v. Hardy*, 169 U.S. 366 (1897).

The disciplinary proceedings against petitioner were instituted in the Supreme Court of the Territory of Hawaii by the Bar Association of Hawaii, an unincorporated association. The complaint was filed on July 8, 1954, under Rule 19 of the Rules of the Supreme Court of the Territory of Hawaii then in effect.[6] (R. 3-5.)

The complaint was referred on July 8, 1954 as secret file number 45 to the Committee on Legal Ethics and Unauthorized Practice of Law (hereinafter re-

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[5]See e.g., R. 107-115, R. 548-559, R. 585.

[6]Petitioner makes the charge that "when the attorney general took no action the bar association devised an amendment to the Territorial Court's rules permitting the association to file such complaints." (O.B. 20.) Petitioner seems to take the aggrieved posture of one being conspired against and persecuted by all of the members of the Bar. There is no such evidence of record to support this charge. And no such evidence can be shown. However, assuming *arguendo* that the charge is true, it is generally accepted that rules of court with regard to disciplinary proceedings against attorneys can operate retrospectively (*In re Noell*, 234 Mo. App. 1162, 96 S.W.2d 213); and that the statutory method and procedure for disciplining attorneys is not exclusive and does not fetter the courts in the exercise of their inherent power to proceed against unworthy attorneys. (*State v. Spivey*, 213 N.C. 45, 195 S.E. 1; *In re Rudd*, 310 Ky. 630, 221 S.W.2d 688.) It is also an elementary proposition that the *ex post facto* doctrine relates exclusively to criminal or penal statutes (11 Am. Jur. 1179), and it cannot be maintained that the procedural changes involved constitute a denial of due process to petitioner. (*In re Craven*, 178 La. 372, 151 So. 625.)

ferred to as the Ethics Committee). The Bar Association was ordered on September 21, 1954, to file a bill of particulars or to amend paragraph III of its complaint, making more specific its charge involving petitioner's interview with the juror in the *Fujimoto* case. The same order required petitioner to file such special pleas to the jurisdiction of the Ethics Committee, the sufficiency of the complaint and a clarification of her request that the hearing be postponed until after the disposition of the *Fujimoto* case (R. 95, 96). The bill of particulars was filed as ordered (R. 5-13) and petitioner, through her attorney, J. Garner Anthony, advised the said Committee by letter dated October 14, 1954, that she would file no special plea to the jurisdiction nor press for a continuance and announced herself ready to proceed. (R. 105.)

The Ethics Committee proceeded to hold a hearing on November 22, 1954, to investigate the charge made in the complaint, to wit: (1) the alleged improper conduct of petitioner in making the Honokaa speech, and (2) the alleged improper conduct in interviewing a juror in the *Fujimoto* case and filing an affidavit without disclosing all of the facts and circumstances connected thereto. Said Ethics Committee was composed of six respected members of the Bar. Petitioner was represented by J. Garner Anthony. (R. 135) Testimony of 19 witnesses and numerous exhibits were presented to the Ethics Committee on November 22, 23, and 24, and December 2, 3, 6, and 8, 1954. Said testimony covered 468 pages of the 628-page Transcript of Record. (R. 135-543.)

of the Canons of Professional Ethics of the American Bar Association. (R. 15-16.)

The Ethics Committee was of the further unanimous opinion that "it was improper for [petitioner] to submit her affidavit concerning the interview with the juror Fuller to the Presiding Judge under the circumstances under which it was submitted." (R. 16.)

After a study and consideration of the report of the Ethics Committee, the Supreme Court of the Territory of Hawaii, on July 8, 1955, pursuant to Rule 19, issued to petitioner an order to show cause why the findings, conclusions and recommendations of the Ethics Committee should not be adopted. (R. 131.) The cause was then removed from the secret files to the regular files of the court.

Petitioner was granted an extension of time to September 19, 1955, within which to answer the order to show cause, by order filed July 27, 1955. Further extensions of time to answer were granted petitioner at her request or upon motion. (R. 132.)

Instead of a return to the order to show cause, petitioner then filed, on October 19, 1955, a motion to dismiss the order to show cause. Various memoranda were filed and a hearing held. The motion was denied. (R. 132.)

More time for filing petitioner's return to the order to show cause was requested by petitioner and granted to December 2, 1955, and argument set for January 9, 1956. (R. 109.)

After these hearings, the Ethics Committee, on July 1, 1955, filed a report of the charges, facts and conclusions pursuant to Rule 19 (R. 14-18). The Ethics Committee found that petitioner, while one of the attorneys for certain defendants in the *Fujimoto* case, made a speech at a public gathering at Honokaa during the course of the trial, "at which she said among other things, that horrible and shocking things were going on at the trial; that there was no fair trial of the case; that they just made up the rules as they went along, that unless the Smith Act trial was stopped in its tracks in Honolulu there would be a new crime." (R. 15.)

The Committee further found that after the verdict in the *Fujimoto* case, petitioner visited one of the jurors, David P. Fuller, Jr., while he was in a very poor mental and physical condition, and, in submitting her affidavit concerning said interview, petitioner "did not fully disclose to the court the condition of Mr. Fuller, nor the fact that she had attempted to get affidavits from Mrs. Fuller, who refused to sign one, and could not get an affidavit from Mr. Fuller because of his condition." (R. 15.)

Upon these findings, the Ethics Committee was of the unanimous opinion that the charges of the complaint were sustained by the evidence, and that comments made at Honokaa imputing to the judge unfairness in the conduct of the *Fujimoto* trial and impugning the integrity of the local federal courts, and other comments made at Honokaa violated Canons 1 and 22

On November 7, 1955, petitioner filed a motion for reconsideration of the order denying the motion to dismiss the order to show cause. The motion was also extensively argued and denied by order filed November 29, 1955. (R. 132.)

A return to the order to show cause was finally filed by petitioner on December 2, 1955. (R. 18-22; 133.) Another motion for continuance by petitioner followed and another hearing was held. (R. 133.)

On the date set for trial, January 9, 1956, a pre-trial conference was held with all counsel present. Two days later, another delay was occasioned by a suggestion of disqualification of Associate Justices Stainback and Rice of the territorial Supreme Court. (R. 47-70; 133.) Extensive argument again followed. The territorial court held that neither justice was disqualified. (R. 71-90; 133.) However, Mr. Justice Stainback withdrew *sua sponte* from the hearings. (R. 90, 133.)

It was determined at the pre-trial conference that, under Rule 19 of the Rules of the Supreme Court of the Territory of Hawaii, petitioner was entitled to a *de novo* hearing before the Supreme Court. Petitioner, however, through her counsel, suggested and respondent consented to a submission to the court upon the entire transcript of the record and exhibits developed and submitted to the Ethics Committee. (R. 113.) Briefs were duly filed and an extensive oral argument held March 1, 1956.

By opinion filed April 6, 1956 (R. 93-126), the territorial court found *inter alia* that the allegations in the

complaint were "sustained by convincing proof, by credible evidence of more than a mere preponderance"; that petitioner, while an attorney of record in the *Fujimoto* case and during the course of the trial, did say in her public speech in Honokaa, Hawaii, "that horrible and shocking things were going on at said trial, that a fair trial was impossible, that all of the rules of evidence were being scrapped so that the government could make its case; that the rules of evidence and procedure were made up as the case proceeded, and that unless the trial was stopped in its tracks certain new crimes would be created" (R. 116-117); that petitioner exhibited an evasiveness and lack of frankness as to her conduct and equivocated when faced with the testimony of witnesses, yet admitted authorship of language in a pamphlet entitled "Fear" (Exhibit 6) which revealed great similarity with the language attributed to her in her Honokaa speech (R. 115-116); and that shortly after the verdict in the *Fujimoto* case, petitioner visited a juror in that case and studiedly interrogated him, despite said juror's mental and physical condition of which she was aware. (R. 117.) The court found from the testimony and evidence before it that petitioner engaged and participated in a wilful oral attack upon the administration of justice in and by the United States District Court for the District of Hawaii in the *Fujimoto* case and by direct statement and implication impugned the integrity of the judge presiding in the then pending *Fujimoto* case, and thus tended to also create disrespect for the courts of justice and judicial officers generally. (R. 117-118.)

Upon the finding of gross misconduct with respect to the Honokaa speech, the territorial court suspended and prohibited petitioner from the practice of law for a period of one year and to pay all costs and expenses of the proceedings. (R. 118.)

The territorial court also found that petitioner's repeated and studied interrogation of the juror Fuller amounted to gross misconduct but let its disciplinary order of one year suspension and payment of costs suffice.[7] (R. 121.)

A notice of appeal to the United States Court of Appeals for the Ninth Circuit was filed by petitioner on April 13, 1956. (R. 128.)

On the same date and upon her request, petitioner was permitted to maintain the status quo of her business affairs pending appeal to the court below for a stay of suspension. (R. 134.) Said order was extended by the territorial court at petitioner's request on April 26, 1956. (R. 134.)

Petitioner filed a motion in the court below for a stay pending appeal of the order of suspension, or for

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[7]The court specifically found that petitioner's repeated interviews with and interrogations of juror Fuller constituted gross misconduct. (R. 121.) Inasmuch as a one-year suspension and charge of costs had already been adjudged on the Honokaa speech charge, the court let that disciplinary order suffice. It is the contention of respondent that the decision to let such disciplinary order stand as it did was predicated upon the continued validity and effectiveness of the discipline on the Honokaa speech charge. The court below found the penalty for the two charges as being imposed concurrently. If the punishment in the Honokaa speech charge is reversed, the juror charge should be referred back to the territorial court to determine the sanction to be applied. (R. 568.) Be that as it may, both charges were found by both courts to be sustained by the evidence. One of the concurring judges on the territorial court recommended disbarment. (R. 123.)

a writ in aid of that court's jurisdiction dated April 23, 1956. Said motion was granted on May 23, 1956. (R. 623-624.) Circuit Judge Lemmon dissented. (R. 625-628.) Thence followed two more hearings on a motion to dismiss and on the merits. A judgment of the court below was filed on June 9, 1958. (R. 547-622.)

It seems patently clear from the foregoing that petitioner had more than her day in court. She was accorded due process of law that met every demand under our Constitution. Reasonable notice of the charges against her, a reasonable opportunity to be heard in her defense, eminent counsel of her own choosing, protracted hearings with free and full exercise of her right of confrontation, presentation of testimony, examination and cross-examination of witnesses, an opportunity for a *de novo* hearing, and abundant leeway from the standpoint of time and number to file motions and demands of varied forms and hues were all accorded her.

The court below was obviously aware of the roadblocks to its jurisdiction over the matter. It took jurisdiction by the "narrowest thread." (R. 567.) The sense of its jurisdiction, it candidly admits, is highly conjectural. The narrow limits of review involved in *Konigsberg v. State Bar*, 353 U.S. 252 (1957) and *Schware v. Board of Bar Examiners*, 353 U.S. 232, do not strengthen its weak thread of jurisdiction. This Court's latest pronouncement in *Theard v. United States*, 354 U.S. 278, it would seem, should snap the chain by which jurisdiction was purportedly found by the court below. A charge of a constitutional depriva-

tion and impingement, no matter how vigorously canted, should not present a one-way ticket to a review of a local disbarment proceeding. Due process as required by *Ex parte Wall*, 107 U. S. 265 (1882), having been amply satisfied, respondent submits that jurisdiction should have been refused.

II.

THE JUDGMENT OF THE TERRITORIAL COURT, AFFIRMED BY THE COURT BELOW, SUSPENDED PETITIONER FROM PRACTICE IN THE TERRITORIAL COURTS ONLY AND CREATES A STANDARD OF CONDUCT OF AN ATTORNEY THAT AFFECTS HER LICENSE TO PRACTICE IN THE TERRITORIAL COURTS ONLY. THE RIGHT TO DETERMINE WHO SHALL BE A MEMBER OF THE TERRITORIAL BAR IS WITHIN THE SOLE JURISDICTION AND POWER OF THE TERRITORIAL COURT.

Petitioner and *amicus curiae* herein, maintain that the judgment of suspension by the Supreme Court of the Territory of Hawaii, affirmed below, constitutes interference by the territorial court with the administration of justice by the federal court. The Honokaa speech was concerned with proceedings then going on in the federal court; the interview was that of a juror who served those federal court proceedings. Therefore, it is reasoned, the standards of behavior by petitioner should be set by the federal court. The inexorable adjunct to this rationale, carried to its logical conclusion, is that as long as petitioner misconducts herself on the federal side of the street, it is none of the Territory's business. The Territory must turn its eyes away until she misconducts herself

on the territorial side of the street. This, despite the fact that she is a member of the territorial bar.[8]

Such an argument ignores the rule enunciated over and over again by this Court that the power to disbar for misconduct of an attorney is incidental to the licensing authority. The ruling consideration is the preservation of the bar and maintenance of justice, unsullied by the ministrations of persons unwilling or unable to uphold the dignity of the profession and to improve not only the law but the administration of justice. *Ex parte Burr*, 9 Wheat. 529; *Ex parte Secombe*, 19 How. 9; *Ex parte Wall*, 107 U.S. 265; *Brad-*

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[8]In this connection, respondent insists that the federal judge must have determined that petitioner's conduct transgressed no federal rules, since Judge Wiig and the District Court took no action. She also points with pride to the praise of counsel at the end of the *Fujimoto* case. (O.B. 73, n.) Suffice to say that 18 U.S.C. § 401 limiting contempt action to misbehavior of any person in the court's presence or so near thereto as to obstruct the administration of justice has geographical limitations which made a contempt action by Judge Wiig out of the question. (*Nye v. United States*, 313 U.S. 33.) The so-called ecomium of Judge Wiig to all counsel for their demeanor in the courtroom cannot be stretched to include petitioner's Honokaa speech. Judge Wiig was not satisfied with petitioner's evasive explanation of her speech and referred it to the U. S. attorney for investigation and possible contempt charges. After being informed of the limitations against a contempt citation in this instance, he referred the matter to the Bar Association for appropriate action. (R. 537-541.) The United States District Court of the District of Hawaii also issued an Order of Suspension against petitioner (In the Matter of Harriet Bouslog Sawyer, also known as Harriet Bouslog, an Attorney at Law, Misc. No. 649) which ordered that petitioner be suspended forthwith from practice before that court, such suspension to continue until she shows good cause to the contrary pursuant to Rule 1(d) of the Rules of Civil Procedure of that court and further that petitioner have twenty days from date within which to show cause why that court should not enter an order of disbarment or of suspension for such time as the court shall fix. On June 20, 1956 stay of the order of suspension was signed by Federal Judges McLaughlin and Wiig.

ley v. Fisher, 13 Wall. 335. Misconduct, whether on the federal or territorial side of the street, is misconduct that invites and merits stern and just condemnation by either or both courts.

Petitioner slights the import of *In re Isserman,* 9 N.J. 269, 87 A.2d 903, in this connection. She states that the state court (New Jersey) determined the fitness of Isserman to remain a member of its bar on the basis of the federal court's determination that he had committed an offense against the federal court. That case indicates that the state court, as the jurisdiction primarily responsible for Isserman's conduct at the bar, applied its own standard of conduct to the actions of Isserman before the federal court. No other conclusion can be reached from the following words of Chief Justice Vanderbilt:

> ". . . The respondent must be judged by the standards of practice prevalent here. It is unthinkable that any one of the many incidents for which the respondent was convicted of contempt in New York could have occurred in New Jersey. The mutual respect that our bench and our bar have traditionally had for each other and their high regard for the administration of justice would have precluded any such conduct by an attorney here. . . . In fairness to the courts of other jurisdictions and out of a decent respect for the opinion of the people of this State, we cannot permit a lawyer admitted to practice in New Jersey to do in the courtroom of another jurisdiction what he would never have been allowed to do here. To do so would bring into disrepute our bar, our bench and our entire judicial establishment." *Id.* at 907.

We are not concerned here with an evaluation of what is the proper procedure to be followed by the federal and territorial court in circumstances of this nature. The mere fact that New Jersey waited until the federal court acted is no authority for the proposition that *Isserman* supports petitioner's position. True, New Jersey accepted the evaluation of Isserman's conduct by the federal court and accepted the fact that Isserman was disciplined by the federal court. But New Jersey did not discipline Isserman merely because the federal court did so. New Jersey judged Isserman by the standards of practice prevalent in New Jersey. The determination of the standard of conduct required of an attorney licensed in New Jersey was not made dependent upon the determination of the standard of conduct required by the federal court.

Thus, the determination in *Isserman* declared the law for New Jersey. It declared a standard of conduct for attorneys licensed to practice in New Jersey to be followed in any jurisdiction, local or federal. The determination of the courts below in the case at bar did nothing more than *Isserman*. It did not establish "standards of conduct for federal attorneys in cases before federal courts" as charged by petitioner. It established a standard of conduct for attorneys licensed by the territorial court to be followed and observed by such Hawaii attorneys in any jurisdiction, local, state, or federal. There was no usurpation of the federal court's power. Indeed, the federal court is free to bring disciplinary proceedings against peti-

tioner irrespective of the action of the territorial court.[9] See *Selling v. Radford*, 243 U.S. 46; *In re Isserman*, 345 U.S. 286, 348 U.S. 1; *Theard v. United States*, 354 U.S. 278.

The two cases cited by *amicus curiae*, *Ex parte Tillinghast*, 4 Peters 108, and *Ex parte Bradley*, 7 Wall, 364, do not differ from the rule herein urged. *Tillinghast* does not prevent any other court or jurisdiction from inquiring into the fitness of its licensees for misconduct elsewhere. Its only limitation is against summary action or punishment based upon a contempt committed in another court. *Bradley* explicitly recognizes the right of another court or jurisdiction to discipline or disbar its licensees for misconduct before another court or in another jurisdiction. This Court in *Bradley* held that the lower court exceeded its authority in disbarring Mr. Bradley on the basis of a contempt committed in another court and on the basis of "an ex parte proceeding, without notice or opportunity of defense or explanation for misbehavior," and "'irrespective of the doctrine of contempts.'" *Id.* at 374-375. It therefore seems clear that the error of the offending courts in *Tillinghast* and *Bradley* was in summarily disbarring merely upon the determination of contempt by another court. In passing, if New Jersey in *Isserman* had, in fact, disciplined Isserman only on the basis of the contempt determination of the

[9]The United States District Court for the District of Hawaii issued an Order of Suspension dated April 7, 1956 against respondent (In the Matter of Harriet Bouslog Sawyer, also known as Harriet Bouslog, an Attorney at Law, Misc. No. 649) pursuant to Rule 1(d) of the Rules of Civil Procedure of that court. This order was stayed on June 20, 1956.

federal court, as petitioner herein insists, Isserman would have run afoul of the rule in *Tillinghast* and *Bradley*. Instead, New Jersey brought its own disciplinary proceedings against Isserman, gave notice to appear and opportunity to be heard and made its own determination on the basis of its own standards of conduct for attorneys practicing in New Jersey. This is precisely what the territorial court did in the case at bar. Such action in no way interfered with the administration of justice in the federal court or set up standards of conduct for federal attorneys practicing in federal courts.

Selling v. Radford, 243 U.S. 46 puts into sharp focus what respondent contends for herein. The ruling in *Tillinghast* is distinguished and limited as above. *Id.* at 51. This Court, in dealing with a petition to disbar from federal practice on the basis of disbarment from state practice, recognized that the right to practice in this Court could be taken away only by its own determination. *Id.* at 41. It was further recognized, however, (a) that this Court had no authority to re-examine or reverse as a reviewing court the action of the state court in disbarring a member of its bar from practicing in the state courts for personal and professional misconduct, (b) that the order of disbarment is not binding on this Court as the thing adjudged in a technical sense, but (c) the necessary effect of the state court action would be to show absolutely the lack of private and professional character necessary for the practitioner's right to continue to be a member of the federal bar, unless for some rea-

son the state court action is not accepted. *Id.* at 50. It is clear from the foregoing that disciplinary proceedings by the local state jurisdiction are not limited only to misconduct committed beyond the confines of federal court jurisdiction. Each jurisdiction, in its own right, may impose reasonable standards of conduct on its practitioners in or out of court and in any court.

The disciplinary case of *Geibel v. State Bar of California*, 11 Cal.2d 412, 79 P.2d 1073, 1074, 1075 (1938), *cert. den.* 305 U.S. 653, *reh. den.* 305 U.S. 676, clearly states the rule applicable herein, citing *Selling v. Radford*:

> "If an attorney admitted to practice in the courts of this state commits acts in reference to federal court litigation which reflect on his integrity and fitness to enjoy the rights and privileges of an attorney in the state courts, proceedings may be taken against him in the state court. People v. Green, 9 Colo. 506, 13 P. 514, 524; State v. Grover, 47 Wash. 39, 91 P. 564; In re Lamb, 105 App. Div. 462, 94 N.Y.S. 331; In re Sherwood, 259 Pa. 254, 103 A. 42, L.R.A. 1918D, 447; Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377, 61 L.Ed. 585, Ann. Cas. 1917D, 569; 5 Am. Jur. 433; 7 C. J. Sec., Attorney and Client, § 18, p. 730."

This Court recently recognized the same rule in *Theard v. United States, supra,* stating that "The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers; among whom, in the pres-

ent context, lawyers are included." *Id.* at 281. This Court made it clear that it was not sitting in review of the state court judgment of disbarment of respondent therein. Recognition was accorded the state court judgment insofar as the state disbarment was concerned; the federal disbarment proceeding of the same attorney for the same alleged misconduct to determine his fitness to practice in the federal courts only was deemed the responsibility of the federal judiciary. The "deference" which the petitioner herein insists on imposing upon the territorial and federal courts, each to the other, is of no moment here. Each court, in pursuit of its autonomous control over its attorneys and its inherent authority to maintain the honor and integrity of a profession which depends upon public trust and confidence for its very existence, is permitted and, in fact, obliged to demand that all lawyers meticulously adhere to the standards of conduct that would merit such public trust and confidence. As stated by the court below, the Territory should be commended rather than chided for so doing. (R. 566.) The federal law, recognizing this inherent right, has been enunciated by this tribunal from its earliest pronouncement by Mr. Chief Justice Marshall in *Ex parte Burr* to the most recent pronouncement by Mr. Justice Frankfurter in *Theard*.

III.

THE RECORD IN THE SUPREME COURT OF THE TERRITORY OF HAWAII AND IN THE COURT BELOW RATIONALLY SUPPORTS THE FINDINGS BELOW.

A. The action of the disciplining court, affirmed by the court below, in suspending petitioner from the practice of law for one year, in the exercise of its statutory and inherent power to insure the dignity and proper function of judicial processes is amply supported by the evidence and does not offend due process.

Point One of petitioner's brief (O.B. 30-63) seems to amount to a well-contrived assertion that petitioner did not mean to say what the courts below found that she said. She insists that when she spoke of "the horrible and shocking things (that) were going on at the current Smith Act trial in Honolulu," she meant to attack and impugn the integrity of government agents for "their tactics of prosecution, their methods of recruiting witnesses, their 'propaganda', their use of obviously unreliable witnesses." (O.B. 35.) And the other horrible and shocking thing that she was referring to was the Smith Act which was a weapon of thought control. (O.B. 35.)

She further insists that when she said that the trial was not a fair one, she meant that the trial was not a fair one because it was made unfair by the government through the scrapping of the rules of evidence, through the use of perjurious witnesses who "say things in order to convict," through a propaganda barrage so that hysteria about communism infects the jury, through F.B.I. pressure to force people to testify as it wants. (O.B. 36-37.) Judge Wiig, the

presiding judge in the *Fujimoto* case, apparently had nothing to do with the unfair trial she was talking about.

She insists again that when she said "all rules of evidence have to be scrapped and the government can't make a case," she was talking about conspiracy cases in general. (O.B. 37-38.) Her remark that "with the same situation a federal judge sitting on a federal bench permits Crouch to testify about 27 years ago" was made to illustrate the difference between rules of evidence in conspiracy cases in general and the *Palakiko-Majors* murder case. Therefore, the point is made that Judge Wiig was not charged with wrongdoing or lack of integrity (O.B. 38) and that this line of discussion "simply explains the results of the application of rules of law in the case at hand." (O.B. 38.) Again, petitioner maintains that "there's no fair trial in the case. They just make the rules as they go along" (R. 577), was also addressed to the operation of rules of evidence in conspiracy cases and the government's evil hand in expanding the scope of admissibility (O.B. 38). Judge Wiig, again, was nowhere around and the unfairness of the trial was the dirty work of the prosecution who dictated what evidence would be admitted.

The remark that unless the Smith Act trial at Honolulu was stopped in its tracks there would be a new crime, according to petitioner, was made in the context of observation about another Smith Act trial and the dangers of thought control and censorship. (O.B. 39.)

In summary, the whole thrust of the Honokaa speech, to hear petitioner explain it, was a learned discussion of the horrible and shocking things that can and do occur in courtrooms without any fault of the judge and without reflecting upon his judicial integrity. This, because "unfairness of a trial may result from many things beyond the judge's control." (O.B. 44.) Therefore, what petitioner was disciplined for, in the words of petitioner, "was not animadversion upon the judge but rather attack upon the Department of Justice and certain rules of law." (O.B. 49.)

Respondent agrees with the majority below that petitioner's counsel has interwoven, with great deftness, "the defense version of the testimony into the bar association's evidence pointing the other way" (R. 561) and that petitioner "overly dissects the evidence and puts too innocent a gloss on it." (R. 564.) Despite petitioner's claim that her argument is based upon an analysis of the news reporter's notes (O.B. 31) the fact remains that what she said at Honokaa is what is before the court and not what she meant to say, upon more sober reflection, or what she was supposed to have said or meant to say, with the aid, in retrospect, of skilled counsel.

To put the so-called "textual remarks" (O.B. 35) in the notes of the news reporter and the abundant testimony of record in proper perspective, the Honokaa speech must be taken in its entirety and must be viewed within the setting of the day. Petitioner does not deny that she made the speech to a gathering

consisting largely of members of the International Longshoremen's and Warehousemen's Union at Honokaa, Hawaii, while serving as counsel for certain respondents, including Jack Hall, in the *Fujimoto* case then at trial in Honolulu before the Honorable Jon Wiig, United States District Court Judge for the District of Hawaii. The meeting was held under the auspices of the defense committee set up by the I.L.W.U. (R. 410). Jack Hall, one of the defendants in the *Fujimoto* trial was the Regional Director of the I.L.W.U. (R. 385.) The defense committee was established to undertake and finance the defense of Jack Hall and any other union member defendant under the Smith Act. (R. 401-402.) It was handling the financial contributions to this end. (R. 402.) The meeting at Honokaa, however, was not held for the purpose of securing further contributions, because the contribution program of the defense committee had been set up and approved long prior to the time of the Honokaa meeting. (R. 410.) The meeting at Honokaa was for the purpose of reporting back about the Smith Act trial to those who contributed to Jack Hall's trial. (R. 410.)

Jack Hall, one of the defendants in the Smith Act trial then going on in Honolulu being defended by petitioner, was on the speakers' rostrum with petitioner and also gave a speech following petitioner's speech. (R. 574.)

This is the framework within which the questions involving the Honokaa speech must be viewed. The audience was composed of a majority of union mem-

bers who had contributed to the defense of petitioner's client, Jack Hall. They were conceivably there to hear about how their money was being spent. It is reasonable to assume that these laymen were more interested in the details of the immediate trial rather than in a lawyer's general critique on the provisions of the Smith Act. The stage was thus set for Jack Hall's lawyer's speech.

Petitioner, as discussed above, insists she spoke of Smith Act trials in general. The evidence is otherwise. Virtually all of the testimony in the case undeniably points to the fact that petitioner was referring to the trial then going on in Honolulu. The evidence indicates that petitioner commenced her speech by pointing out that "the trial is really a trial of Jack Hall" to which six others had been added, the purpose being to get at the I.L.W.U. (R. 574.) No reasonable mind would deny that this statement referred to the *Fujimoto* trial.

The news reporter Matsuoka positively testified that petitioner was talking about "[t]he Smith Act trial, that was under way in Honolulu." (R. 150.)

The testimony of Mrs. Thelma Olival, another witness, corroborates this in positive terms:

"Q. Now what trial was she referring to?

A. To the Jack Hall trial.

Q. Do you know where that trial was being held?

A. In Honolulu here.

Q. There is no doubt in your mind that she was referring to that trial?

A. Oh, yes, she was referring to it." (R. 172.)

Ethel Chong Andrade, a plantation worker, testified that petitioner gave "a very excellent speech", "a very interesting", "very stimulating" talk and that Mrs. Bouslog "said she would like to tell the audience of the horrible and shocking things that went on at the Smith Act trial in Honolulu" and "she also gave several illustrations". (R. 180-181.)

David K. Crabb, another witness, definitely stated that petitioner, in saying that "the defendant in the Smith Act trial cannot get a fair trial", was talking about the Smith Act trial in Honolulu. (R. 183.)

Another witness, Mrs. Phyllis P. Morse, also testified that "she (petitioner) said there was no such thing as a fair trial under the present Smith Act case in Honolulu." (R. 184.)

These statements were put in honest and candid perspective by petitioner's own counsel, J. Garner Anthony, toward the close of the Ethics Committee hearing, thusly:

> "Mr. Anthony. I will say to the Committee right now—I have read these speeches and I would agree with the conclusion implicit in Mr. Dodge's question, namely that *this was a talk about what was going on in the Smith Act trial here in Honolulu. Now let's not fool ourselves about that. We're lawyers here.*" (Emphasis added.) (R. 526.)

The foregoing testimony amply supports the conclusion that petitioner's remarks were directed towards the Smith Act trial in Honolulu. Her speech

cannot be glossed over as being generalized comments on the Smith Act or all Smith Act trials.

Petitioner insists that her attacks on what was going on at the trial did not encompass the trial judge. (O.B. 39, 40, 41.) Apparently in view of the abundant corroboration of this fact in the record, petitioner does not make an issue of whether or not she actually said that shocking and horrible things went on at the trial. The news reporter Matsuoka noted that petitioner "said she wanted to tell about some rather shocking and horrible things that go on at the trial." (R. 574.) He also testified that

> ". . . She said she wanted to tell the people about some of the shocking, horrible things that went on, and that the Smith Act trial could not be a fair one, and that they just had to go around and make rules to fit the situation. . . ." (R. 151.)

Mrs. Olival positively testified that petitioner used the words "shocking and horrible things that were going on" in characterizing the Smith Act trial in Honolulu. (R. 172.)

Mrs. Phyllis P. Morse remembered that petitioner gave "various examples of things that I don't recall, that were going on, in what she called the horrifying, shocking trial." (R. 185.)

Petitioner's only contradiction of this overwhelming evidence of record is her testimony that she has no recollection of having made such a statement. (R. 527.) Through her counsel, J. Garner Anthony, she stated that she will not deny having made the state-

ment. (R. 528.) In addition, there is of record the abortive attempt by petitioner's client, Jack Hall, to take the blame for saying that some rather shocking and horrible things are going on at the trial. (R. 395-398.)

Without belaboring this point in view of the weight of the evidence against the probability that no such statement was made in her speech, petitioner argues that there is nothing wrong with such a statement. She points out that many shocking and horrible things go on in the courtroom without any fault of the judge. (O.B. 41-42.)

Petitioner's major premises and attack upon the import of this charge start off on a misleading tangent, (O.B. 35), despite her resolve at the outset not to engage in "deft interweaving" of the evidence. (O.B. 31.) She maintains that when she said she "wanted to tell about some rather shocking and horrible things that go on at the trial" (R. 574), this was "obviously an introductory remark by way of preface to the speech as a whole." (O.B. 35.) Even assuming this to be a prefatory statement, it is submitted that what followed very definitely attributed much of the shocking and horrible things to Judge Wiig.

The courts below, therefore, found that the charges did constitute an attack upon the administration of justice and did impugn the integrity of the presiding judge and did tend to create disrespect toward the courts and judicial officers. These findings are established by clear and convincing proof. The news reporter Matsuoka notes that petitioner charged that

"there is no such thing as a fair trial in a Smith Act case. All rules of evidence have to be scrapped or the government can't make a case . . . there's no fair trial in the case. They just make up the rules as they go along." (R. 577.)

The "federal judge sitting on a federal bench" attacked by her in this connection could not have been Judge Medina or any other judge but Judge Wiig. (R. 577.) Petitioner makes much of the words "a" and "they" in her version of what she meant to say at Honokaa. Her obvious reference to and attack upon Judge Wiig is followed by "and yet here *they* permit a witness to tell what was said when a defendant was five years old." (R. 577.) "They" referred to Judge Wiig, also, the "federal judge sitting on a federal bench" who permitted Crouch to testify about 27 years ago. (R. 577.) In fact, a conspiracy between judge and prosecution could rationally be inferred. This reference is made not to fall into petitioner's pitfall of overly dissecting the evidence, but to emphasize the fallacy of such dissection to prove a point.

Matsuoka testified at the hearing that petitioner charged "that the Smith Act trial could not be a fair one, and that they just had to go around and make the rules to fit the situation." (R. 151.)

In fact, petitioner admitted before the Committee and to Judge Wiig that she did charge that "There's no such thing as a fair trial in the Smith Act case" (R. 443, 444), and in explanation of this charge, she added that there is no such thing as a fair trial in

any Smith Act case, including the Smith Act case then going on in Honolulu. (R. 445.)

Mrs. Thelma Olival also testified that "Jack Hall was being tried on something that he read many years ago, and she said that in the Smith Act trial there were no rules, and that they were making up the rules as they went along. . . ."(R. 172.)

Daniel Ramos also testified that "she said there was no fair trial in the Smith Act case." (R. 179.) So did David K. Crabb who testified that petitioner said the defendant in the Smith Act trial in Honolulu cannot get a fair trial. (R. 183.)

Mrs. Phyllis P. Morse corroborated the fact that petitioner attacked the type of evidence being admitted in the *Fujimoto* trial, thusly: "A. Well, she said that the government could submit any evidence they liked at any time, and that they could also use books that might not have any bearing on the case." (R. 185.)

No reasonable mind should deny that the references to the unfairness of the trial were directed at the trial over which Judge Wiig was then presiding. It would only be by some abortive reasoning which the courts below could not and did not stomach and which this Court should not countenance, that Judge Wiig could be left out of the picture and his integrity left unscathed.

In support of this attack—that there could be no fair trial in the Smith Act case because all of the rules of evidence have to be scrapped so the government

could make its case and the rules of evidence and procedure were made up as the case proceeded—petitioner specifically referred to various happenings which were transpiring in the Smith Act case then being tried in Honolulu. In fact, petitioner admitted picking four illustrations from the *Fujimoto* case to speak about in this connection, specifically naming Johnson and Crouch, two witnesses who testified in the *Fujimoto* case. (R. 450-451.) In referring to the testimony of Johnson, she stated that Johnson came back from San Francisco with Communist books and literature in a duffel bag, that Johnson testified that when he got to Honolulu he told Jack Hall the names of some of the books. She charged that the government then for two days of the trial read from the books supposed to have been in the duffel bag and not with what Jack Hall said. She further stated that on cross-examination Johnson testified that he didn't show the books to Jack Hall, but showed only the duffel bag. (R. 576.) The reference to widening of the rules of evidence to include "everything including the kitchen sink" was also made in this context. (R. 577.)

Petitioner's client, Jack Hall, confirmed the news reporter's notes on this point. He testified that petitioner did talk about the testimony of Johnson in the Smith Act trial in Honolulu. (R. 406.) He also testified that petitioner talked about the "duffel bag evidence" in this connection. (R. 406.)

Petitioner also testified: ". . . I did make a statement concerning Mr. Johnson showing Mr. Hall a duffel bag containing books and I explained on the

basis of Mr. Hall's having seen the duffel bag, the books contained in the duffel bag had been admitted into evidence." (R. 455.)

Petitioner's charge about Johnson's testimony is also confirmed by John D. Morse. (R. 167.)

The record discloses that petitioner also referred to the testimony of Paul Crouch, another witness in the *Fujimoto* trial. (R. 450.) Petitioner specifically admitted that she referred to Crouch's testimony in order to show the people present what kind of testimony was going on at the trial. (R. 454.)

The news reporter Matsuoka's notes state that petitioner charged that in the *Majors-Palakiko* habeas corpus case in which petitioner was involved, the Supreme Court of the Territory refused to allow the testimony of a woman who reported to her that a police officer beat a confession out of one of her clients because the police officer was not present to deny her testimony. Yet "with the same situation a federal judge sitting on a federal bench permits Crouch to testify about 27 years ago, what was said then." (R. 577.)

When questioned about the evidence, petitioner testified thusly:

> "The Witness. Those are not my words. The substance, the fact that I was in the Majors-Palakiko case—that in that case the Supreme Court of the Territory had refused to permit Mrs. Hughes' testimony; that Vernon Stevens had told her that he had beaten Palakiko was not permitted by the Supreme Court; whereas in the

Smith Act case in general, as well as in this Smith Act case, people who had been many years away and had never seen this defendant were permitted to testify.

Mr. Barlow. In other words, would it be fair to say that you paralleled that with the phrase that Mr. Matsuoka attributes to you: 'With the same situation, a Federal judge sitting on a Federal Bench, permits Crouch to testify about 27 years ago what was said then'?

The Witness. I used the Palakiko-Majors case as a contrast to Mr. Crouch's testimony and the hearsay testimony in the conspiracy case.

Q. That Judge Wiig was allowing in the present Smith Act case, is that right?

A. The motions hadn't been argued yet.

Q. No, but that Judge Wiig was allowing in the present Smith Act case?

A. Yes, he was." (R. 457.)

The attack on the action of Judge Wiig in the *Fujimoto* case as compared with the action of the territorial court in the *Majors-Palakiko* case is also referred to in the recorded testimony of Gilbert Ferreira. (R. 163.)

In her attempted contradiction of this evidence, petitioner insists that in charging that there is no such thing as a fair trial in the Smith Act case, she was referring to Smith Act cases in general. This contention has no basis in fact. It is firmly established by the foregoing evidence that her charge was directed toward the *Fujimoto* trial. Even assuming *arguendo* that said charge was meant to refer to Smith Act

cases in general, she illustrated and explained her charge with attacks on what was going on at the *Fujimoto* trial. The *Fujimoto* trial being a Smith Act case, the syllogism is manifestly complete. Her contention that she was talking in generalities seems quite lame in the face of her attacks on the type of testimony being admitted in evidence in the *Fujimoto* trial. In illustrating the unfairness of Smith Act cases with specific attacks on Judge Wiig's actions in the *Fujimoto* case, her purported generalities patently ceased to remain generalities.

Petitioner attempts to explain that her charge that all of the rules of evidence were being scrapped so that the government could make its case and that the rules of evidence and procedure were made up as the case proceeded were not directed at Judge Wiig or the court. She points out that Judge Wiig was never mentioned by her. She emphasizes that the pronoun "they" (meaning the government) was used. She contends that her remarks were directed towards the conduct of the prosecuting attorneys and to certain rules of law. (O.B. 40, 49.)

There is one primary and patent fallacy in these contentions. It is hornbook law that needs no citation of authority that rules of evidence and procedure in any trial are not made by the prosecuting attorneys. That is within the sole and exclusive province of the judge. It is the judge who rules upon the competency, relevancy, and materiality of any evidence offered by the prosecution or the defense. It is the judge who rules upon the proper procedure at the trial. If there

be any scrapping of the evidence to permit the prosecution to make a case, if there be any rules of evidence and procedure "made up" as the case proceeds, it is the unjudicial handiwork of the judge and no one else. It follows that the charge that "all rules of evidence have to be scrapped so the government could make its case" and that "the rules of evidence and procedure were made up as the case proceeded" was an unvarnished attack which "by direct statement and implication impugned the integrity of the presiding judge" and was an attack upon the administration of justice in and by the said court. The courts below so concluded, and properly so. The conclusion also follows that such attacks, not by a layman, but by an officer of the court favored with the mantle of respectability and authority of a license to practice law, most assuredly tended to create disrespect towards the courts and judicial officers. The courts below so concluded, and properly so.

Only a few words need be said about the finding that petitioner charged that "unless the trial was stopped in its tracks certain new crimes would be created." Petitioner does not attack the finding that petitioner made such a statement; she only attacks the conclusion that she attacked the administration of justice and impugned the integrity of Judge Wiig. (O.B. 39-40.) Petitioner again attempts to isolate this charge from the fabric and framework of her speech. Since petitioner does not attack this finding, it is presumed that the record discloses that said finding has a reasonable basis in the evidence. From the ad-

mitted valid finding of the court on this matter, it rationally follows that where the conduct of the trial by the judge is characterized as encouraging new crimes (however identified or unidentified) unless stopped in its tracks, the administration of justice and integrity of the judge are questioned. There is indeed a rational connection between the fact admitted as proved and the ultimate fact presumed on this point. Such a charge would certainly also tend to create disrespect for the courts of justice and judicial officers generally. The courts below so found, and properly so.

As a corollary to her attempt to develop what she meant to say in her Honokaa speech, petitioner assails the "treachery" of the type of evidence that constitutes the record herein. (O.B. 30-31.) She charges that the testimony of the eight witnesses was "fragmentary in the extreme," and "often extracted by prodding and leading questions," and "confined only to the remarks charged in the complaint." (O.B. 30.) She decries the fact that no attempt was made to elicit the full speech or the context of any particular remark and no effort was made "to develop petitioner's statements with any precision." (O.B. 30.)

This complaint directed to the record herein has no basis in fact. However, even assuming *arguendo* that such complaint has some credence, such attack on the record made below is untimely and no grounds for reversal by this Court. *The "Richmond"*, 103 U.S. 540; *The Ship Marcellus*, 1 Black 414. Petitioner was represented by old-time counsel, J. Garner Anthony, Esq., throughout the hearings before the Legal

Ethics Committee. (R. 135, et seq.) She had an opportunity to present her own witnesses from the predominantly ILWU audience at Honokaa. She had an opportunity to contradict, rebut, amplify, or otherwise deal with the testimony of the eight witnesses to prevent it from being fragmentary and confined in scope. (O.B. 30.) She could have "elicited the full speech" or "the context of any particular remark" and developed her statements with the precision she complains was lacking at the time of the committee hearing. (O.B. 30.) Her counsel was present throughout the hearings and engaged in protracted cross-examination of all witnesses. (R. 135, et seq.) Nothing prevented petitioner or her counsel to present witnesses on her behalf. Petitioner, in fact, did call Jack Hall as a witness on her behalf and also testified herself. (R. 427.) But, as the court below found of great significance, she did not produce a single member of the sympathetic and predominantly ILWU audience to confirm her version of the speech. (R. 561.) This is no cause for complaint by petitioner's present counsel against respondent.

Petitioner further had an opportunity to "develop petitioner's statements with any precision" by availing herself of her right to a trial *de novo* before the Supreme Court of the Territory of Hawaii. (O.B. Appendix 83.) Instead, she chose to submit the case to the Supreme Court on the record made before the Legal Ethics Committee. (O.B. 6, R. 113.) Both courts below weighed the evidence and both found the evidence to support the judgment according to law.

In such a case, this Court has followed the rule as expressed in *The Ship Marcellus, supra:*

> "We have had occasion to remark more than once, that, when both courts below have concurred in the decision of questions of fact, . . . parties ought not to expect this court to reverse such a decree, merely by raising a doubt founded on the number or credibility of witnesses. The appellant in such case has all presumptions against him, and the burden of proof cast on him to prove affirmatively some mistake made by the judge below, in the law or in the evidence. It will not do to show that on one theory, supported by some witnesses, a different decree might have been rendered, provided there be sufficient evidence to be found on the record to establish the one that was rendered." *Id.* at 417.

The presumptions in favor of the correctness of the findings and conclusions by the two courts below must be overcome here. It is not enough to show that if petitioner and her witness, Jack Hall, had been believed, the judgment would be wrong. *(The "Richmond," supra.)* Something more than ingenious criticism is necessary to overthrow a judgment in this Court on the ground that it is not supported by the evidence, where the findings have been approved by the two lower courts. *Delaney v. United States,* 263 U.S. 586 (1924). It is not enough, to invalidate findings of fact in which two courts below have concurred, that the evidence permits conflicting inferences. This Court will "decline to subject to minute scrutiny the language employed by these courts in discussing ques-

tions of fact." *Texas & N.O.R. Co. v. Brotherhood of Railway & S.S. Clerks,* 281 U.S. 548, 560 (1930). As stated by Mr. Chief Justice Hughes in that case:

> "Motive is a persuasive interpreter of equivocal conduct, and the petitioners are not entitled to complain because their activities were viewed in the light of manifest interest and purpose. The most that can be said in favor of the petitioners on the questions of fact is that the evidence permits conflicting inferences, and this is not enough." *Id.* at 559-560.

This comment is eminently applicable herein.

This same attitude has been exhibited by this Court toward disciplinary proceedings of attorneys. This Court first determined the duty of the reviewing court in such a matter in *Ex parte Burr,* 22 U.S. 529 (1824). It recognized the delicacy of interposing its authority and declined to do so unless the conduct of the courts below was greatly irregular or flagrantly improper. It follows that it is enough for the purposes of this Court that there is sufficient credible evidence to support the findings of the courts below. State and federal courts have consistently followed this principle. See *e.g., In re Patterson,* 176 F.2d 966 (9 Cir. 1949), *In re Schachne,* 87 F.2d 887 (2 Cir. 1937), *Schoolfield v. Bean,* 26 Tenn. App. 30, 167 S.W.2d 359 (1942), *In re Morganstern,* 61 Cal.App. 702, 215 Pac. 721 (1923). The New York court in *In re Flannery,* 212 N.Y. 610, 106 N.E. 630, 631 (1914), clearly states this proposition of law as applied to disciplinary proceedings:

"The Appellate Division has found the appellant guilty of gross unprofessional conduct and has decreed his disbarment. On this record our power of review is limited to the consideration of the single question whether the finding of guilt has any evidence to sustain it. Matter of Goodman, 199 N.Y. 143, 92 N.E. 211; Matter of Robinson, 209 N.Y. 354, 103 N.E. 160. It is not for us, where the evidence is conflicting, to determine where lies the truth. It is not for us, where opposing inferences may be drawn, to determine which we shall accept and which reject. It is not for us to revise the measure of punishment which guilt, when adjudged, is to entail. In establishing the standard of conduct to which the bar must, at its peril, conform, the Appellate Division has a wide discretion, with which we have neither the wish nor the power to interfere. If the conduct condemned is not wholly blameless, the extent to which it shall be reprobated is not for our determination. We have no right to say, where any measure of blame attaches to the offense, that the standard has been set too high.

"In the light of these guiding principles we have considered this voluminous record, and have reached the conclusion that the evidence sustains the findings. It would serve no useful purpose to follow the course of the proofs and to point out the inferences to be drawn from them. The court below, where conflicting inferences may have been possible, has seen fit, after weighing the evidence, to draw those adverse to the appellant, and to the rectitude of his purposes and motives. Drawing these inferences it has held that his conduct falls short of the standard to which the members of an honorable profession must conform. The

> appellant would have us say that the conduct which the court below has thus condemned is wholly free from blame. We are asked in effect to serve notice on the bar that what was done by the appellant may, with impunity and honor, be done by others. We cannot give that word."

The judgment suspending petitioner for one year is amply supported by convincing evidence as found by the two courts below. It is not arbitrary, not only on the basis of the evidence of record herein, but also on the basis of standards applied in the Territory of Hawaii and in other jurisdictions.

A major portion of the disciplinary proceedings similar in nature to the instant matter and the resulting pronouncements in the case reports of this and other jurisdictions are compiled in the addendum to the opinion of the Supreme Court of the Territory of Hawaii. (R. 123.) A few additional cases not included in said list are cited in the footnotes by petitioner (O.B. 45-46) and in this brief generally. The cases listed in the addendum and incorporated in the opinion of the disciplining court and the resultant disciplinary measures were considered by the court with reference to the petitioner's case. (R. 122.) An impartial study of the circumstances involved and the discipline meted out in the cases listed in said addendum and petitioner's brief indicates beyond question that the judgment in the instant matter was carefully weighed and not motivated by passion or arbitrariness. In fact, the measure of discipline in many cases where an attorney purportedly, under the theory of peti-

tioner, exercised his freedom of expression has been disbarment instead of suspension. See *e.g., Wilhelm's Case,* 269 Pa. 460, 112 Atl. 560 (1921.) It is also interesting to note that the constitutional question of freedom of expression was seldom raised in these disciplinary cases, and when raised, summarily disposed of. See *e.g., In re Cohen,* 261 Mass. 484, 159 N.E. 495 (1928); see also *Wilhelm's Case,* 269 Pa. 460, 112 Atl. 560 (1921); *In re Hanna,* 30 N.M. 96, 227 Pac. 983 (1924).

The disciplinary cases from the Hawaii jurisdiction also demonstrate that the judgment in the instant case is not arbitrary or excessive. The disciplinary court in the addendum to its opinion sets out six Hawaiian disciplinary cases dating from 1885 to 1928 which it definitely considered in arriving at its judgment. (R. 126.)

In the case of *In re Keliikoa and Barenaba,* 5 Haw. 279 (1885), an attorney was disbarred for taking a fee from a "stupid person" and not representing him in court and in taking additional fees for aid and advice which actually injured him. The other attorney was suspended for three months.

In re Paakiki, 8 Haw. 518 (1892), an attorney was suspended for two years for not making careful and specific inquiries, the circumstances being suspicious, which would have led him to ascertain that a deed was a forgery.

In re Humphrey and Thompson, 15 Haw. 155 (1903), graphically illustrates the high standard of conduct which the territorial court requires of its at-

torneys. The court, in that case, expressed the opinion that when an attorney serves a new client against a former client in the same matter in which he represented his former client, the penalty would be disbarment. However, in view of the looseness of the relationship of attorney and client between the attorney concerned and the former client, his youthfulness and his dependence upon the direction of the older attorney and former judge also involved in this case, he was suspended for one year. The older attorney and former judge, who was found to have committed the further gross misconduct of attempting by friendly appeals, threats and promises to induce another attorney involved in the litigation to betray that attorney's aged and credulous client, was disbarred.

It is respectfully submitted, from the foregoing, that arbitrariness in fact-finding and in the disciplinary measures taken is lacking. Petitioner was not singled out for suspension uninsulated from local pressures and personal bitterness. (O.B. 74.) There is convincing evidence of record which rationally justifies the concurrent findings of both courts below.

B. The action of the disciplining court, affirmed by the court below, in suspending petitioner from the practice of law for one year, in the exercise of its statutory and inherent power to insure the dignity and proper function of judicial processes, did not deprive petitioner of her freedom of speech.

Point II of petitioner's opening brief posits the decision below as "a grave infringement upon freedom of speech in an area of great public concern and by a speaker peculiarly fitted to contribute to public understanding." Subsection 1 reiterates what was urged

in Point I, that nothing in the speech involved Judge Wiig. The speech was a "discussion on a generalized plane and with no thrust at the trial judge." (O.B. 50-51.) Respondent readily admits that if the judgments of the courts below were based on petitioner's view of the facts, the fact-finding below was definitely arbitrary. But this point goes full circle again on what petitioner says she said and meant in Honokaa, not what the trier of fact and the courts below found.

Subsections 2 and 3 urge that a lawyer has a right to comment on "pending case because he seeks not to vindicate a client but to alert the public to what is a serious problem, perhaps a public danger" and that he has no duty to remain silent as a "built-in apologist" for the *status quo* in the judicial branch. (O.B. 53.) Petitioner, however, adds that there are two limits to the lawyer's freedom of comment on pending cases: one as indicated by the "clear and present danger" test and the other which grows out of the lawyer's position as such. (O.B. 54-55.) These two limitations are deemed not applicable herein to petitioner.

Subsection 4 urges the "clear and present danger" test upon the conduct of a lawyer. Such test is urged, not as a formulary, but as a "method of evaluation." (O.B. 57.) Petitioner tips the scale in her favor in balancing the interest of public respect and confidence in the courts against that of free public discussion by the lawyer in a pending case. (O.B. 61.) But this balance in favor of petitioner is again based upon her insistence that a lawyer of her stature and record

would not and did not say things which purposefully attacked Judge Wiig or made out a danger to public respect for the courts. (O.B. 60-61.)

Respondent agrees that any lily-white version of petitioner's speech in Honokaa is not subject to discipline. Indeed, there would be no legal problem herein if the courts below had construed petitioner's speech in the same light as she does. But the problem here is whether the disciplinary action of the courts below is contrary to freedom of speech rights asserted by petitioner. Respondent maintains that First Amendment rights are not involved; but if involved, the action of the courts below is firmly and rationally grounded on a substantial record below.

Petitioner further urges that the importance of free and untrammelled public discussion by a lawyer in a pending case overbalances the possible danger to public respect for the courts by such discussion. (O.B. 59.) Again, the vehicle of this balance in her favor is her version, in retrospect, of what she meant to say in Honokaa. Respondent takes no issue with petitioner's advocacy of "fearless, vigorous and effective advocacy" and of a lawyer's service as a tribune to inform the public "when liberty is threatened." (O.B. 63.) Respondent merely asserts the limitations upon the attorney imposed by the canons of the profession and the right of the licensing authority to maintain the dignity of the bench and the bar. Respondent urges that the case at bar merely involves the violation of the canons of ethics by one licensed to practice in the territorial courts and the extent of the right and responsi-

bility of the territorial court in dealing with said violation. The disciplinary action taken violates no freedom of speech right of petitioner. It gives meaning and vitality to the canons of ethics. It is an admirable step in the right direction of keeping the judicial temple clean. (R. 562.)

This Court early set the standard, formalized later in the Canons of Professional Ethics,[10] for the conduct of attorneys in simple and unequivocal terms. As stated in *Bradley v. Fisher,* 13 Wall. 335, 355:

> "... the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts."

Research has failed to disclose any case in this tribunal involving an assertion of a lawyer's right to

[10]The very first canon in the Canons of Professional Ethics provides: "It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected."

free expression against the disciplinary action of a licensing court which, in effect, stills his voice as an attorney. But cases are legion in the state and lower federal courts. There is universal recognition by these tribunals that freedom of speech guaranteed by the Constitution has its limitations both as to the ordinary citizen and to an officer of the court. As stated by the court in *In re Hilton*, 48 Utah 172, 158 Pac. 691, 696 (1916):

> "*And, as has been repeatedly held, liberty and freedom of speech under the Constitution do not mean the unrestrained right to do and say what one pleases at all times and under all circumstances* (Warren v. U.S., 183 Fed. 721, 106 C.C.A. 156, 33 L.R.A. [N.S.] 800), *and do not license scandal and defamation of courts* (McDougall v. Sheridan, 23 Idaho 191, 128 Pac. 954; Burdett v. Commonwealth, 103 Va. 838, 48 S.E. 878, 68 L.R.A. 251, 106 Am. St. Rep. 916); that it is the use and not the abuse of free speech that is protected, and that every one at all times is responsible for an abuse of the privilege (Diener v. Star-Chronicle Pub. Co., 230 Mo. 613, 132 S.W. 1143, 33 L.R.A. [N.S.] 216); *and that an attorney, guilty of such abuse by slandering or scandalizing or defaming a court or judge, is subject to discipline and disbarment* (Cobb v. U.S., 172 Fed. 641, 96 C.C.A. 477; In re Thatcher, 80 Ohio St. 492, 89 N.E. 39; s.c., 83 Ohio St. 246, 93 N.E. 895, Ann. Cas. 1912A, 810; In re Breen, 30 Nev. 164, 93 Pac. 997; People v. Green, 7 Colo. 237, 3 Pac. 65, 49 Am. Rep. 351). The proposition, supported by cases there cited, is thus put in 2 R.C.L. 1093:
>
> 'Where an attorney indulges in invective or in scandalous innuendo that tends to degrade

the court or to impair its respectability and usefulness, it is the duty of the court to take such steps as may appear to be necessary to preserve its dignity and good name, even to the expulsion of the offender from practicing before it.'

"And, as there further stated, to confer jurisdiction to disbar therefor it is not necessary that the indignity or insult should occur in open court, or constitute a statutory contempt, or be concerning a matter still pending before the court, and that such an offender may be dealt with (page 1098) for acts and misconduct committed in another state. Speaking of the obligation of attorneys, Mr. Justice Field, in Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646, well says:

'The obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. *This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts.*' " (Emphasis added.)

An attorney, of course, does not, in assuming the important place accorded him in the administration of justice, surrender his right as a citizen to criticize the decisions of the courts in a fair manner. But the right of fair criticism does not carry with it the unbounded liberty to engage in such conduct as to impugn the

integrity of the presiding judge or to create disrespect for the courts and judicial officers. *In re Ades*, 6 F.Supp. 467 (D. Md. 1934).

> "Such conduct, whether during the course of litigation or thereafter, is not only a gross violation of the duty of respect to the courts, but, if permitted to go unrebuked, would tend inevitably to bring the courts and our whole system of administering justice into public disrepute. It has rightly been condemned by all courts that have had occasion to pass upon the question, and has generally been regarded as a ground for suspension or disbarment. Thatcher v. U.S. (C.C.A.) 212 F. 801; United States v. Green (C.C.) 85 F. 857; In re Thatcher, 80 Ohio St. 492, 663, 89 N.E. 39; State v. Breckenridge, 126 Okl. 86, 258 P. 744, 53 A.L.R. 1239; In re Hilton, 48 Utah, 172, 158 P. 691, Ann. Cas. 1918A, 271; People v. Metzen, 291 Ill. 55, 125 N.E. 734; People v. Standidge, 333 Ill. 361, 164 N.E. 844; In re Dunn, 85 Neb. 606, 124 N.W. 120, 130; In re Troy, 43 R.I. 279, 111 A. 723; Matter of Rockmore, 127 App. Div. 499, 111 N.Y.S. 879; Scouten's Appeal, 186 Pa. 270, 40 A. 481; and see further authorities, 53 A.L.R. 1244." *In re Ades*, supra, at 481.

This is not to say that an attorney may not criticize the decisions of a court. But, as aptly put by the court below, an attorney cannot litigate on a given case by day and castigate by night (or at recess) the very court that he is appearing before. (R. 568-569.) That this was a case in progress compounds the mischief of petitioner's attack. More so, since an attorney at law, bestowed with an aura of respectability and

credibility of an officer of the court, is chargeable with a higher standard of behavior and conduct toward the court than a layman. *State Board of Law Examiners v. Spriggs,* 61 Wyo. 70, 155 P.2d 285, 289 (1945).

> "Of all men, none owes a more scrupulous allegiance to law and order than the lawyer. If he advises and encourages disrespect for the courts, and indulges in false statements concerning them, he helps undermine the very government to which he has sworn to be loyal. He thus forgets his obligations, both as a citizen and as a member of the bar. The wrong he does affects not only the courts, but the bar as well." *United States v. Markewich,* 261 Fed. 537, 540 (1919).

That the constitutional freedom of speech of an attorney at law does not protect him from his obligation to maintain respect for judicial tribunals is well expressed in *In re Breen,* 30 Nev. 164, 93 Pac. 997, 1000 (1908):

> "The right of free speech is one of the greatest guaranties to liberty in a free country like this, even though that right is frequently and in many instances outrageously abused. Of scarcely less, if not of equal, importance, is the maintenance of respect for the judicial tribunals, which are the arbiters of questions involving the lives, liberties, and property of the people. The duty and power is imposed upon the courts to protect their good name against illfounded and unwarranted attack, the effect of which would be to bring the court unjustly into public contempt and ridicule, and thus impair the respect due to its authority. While it is the duty of all to protect the courts against

unwarranted attack, that duty and obligation rests especially upon the members of the bar and other officers of the court."

It is obvious that "membership in the bar is a privilege burdened with conditions." *In re Opinion of the Justices,* 279 Mass. 607, 180 N.E. 725 (1932); *In re Cohen,* 261 Mass. 484, 159 N.E. 495 (1928); *People ex rel. Karlen v. Culkin,* 248 N.Y. 465, 162 N.E. 487 (1928); *Matter of Rouss,* 221 N.Y. 81, 116 N.E. 782 (1917). In the *Cohen* case, *supra,* it was contended that a limitation upon the right of an attorney to advertise for business was a denial of his constitutional freedom of press, just as petitioner here is contending that a limitation upon her right to say what she said in Honokaa was a denial of the constitutional freedom of speech. The court in the *Cohen* case disposed of such contention thusly:

"The arguments of the respondent founded chiefly upon freedom of the press seem to us quite wide of the mark. Conditions may limit the exercise of constitutional rights. McAuliffe v. Mayor & Aldermen of New Bedford, 155 Mass. 216, 220, 29 N.E. 517. Whatever may be his constitutional rights, a member of the bar must conduct himself as an officer of the court in such manner as not to offend against reasonable rules of propriety established by the court for the general welfare. Courts are solicitous for the rights of one duly admitted to practice law. Matter of Sleeper, 251 Mass. 6, 18, 19, 146 N.E. 269. They owe an equal duty to see to it that the public interests are conserved by observance on the part of lawyers of proprieties indicative of a due appreciation of

> their responsibilities to the court and to the community, even though purely selfish tendencies and profit may be thereby restrained. No constitutional liberty of the attorney at law is infringed by the enforcement of the rule of professional conduct observed by the court in the case at bar." *Id.* at 497.

While the code of legal ethics which most jurisdictions formally or informally adopt has no statutory force, it illuminates the views entertained by the bench and bar concerning the proper conduct of attorneys. *State Board of Law Examiners v. Spriggs,* 61 Wyo. 70, 155 P. 2d 285 (1945). It might be pointed out that Canon 1 of the Canons of Professional Ethics as adopted by the Supreme Court of Hawaii spells out the duty of the lawyer to the courts. Canon 16 of said Canons deals with the duty of the lawyers to restrain clients from improprieties. Canon 20 condemns newspaper publications by a lawyer as to pending or anticipated litigation. These canons on their face are indicative of the fact that the right to practice law, like many of our democratic rights, is burdened with conditions, and the freedom of action and expression of an attorney towards the courts and judges is not as unbridled as that of a layman.

This Court in *Theard v. United States,* 354 U.S. 278, decided on June 17, 1957, reaffirmed the oft-stated rule adopted in the courts below—that membership in the bar is a privilege burdened with conditions. Liberty and freedom of speech under the Constitution do not mean the unrestrained right to do and say

what one pleases at all times and under all circumstances. They do not license scandal and defamation of courts. One of the fundamental duties of an attorney, clearly set forth in the first canon of professional ethics of the American Bar Association adopted by the Territorial Supreme Court and early recognized by this Court, is to maintain a proper respect for courts of justice and judicial officers. *Bradley v. Fisher*, 13 Wall. 335. And such respect does not create a "built-in apologist" for the judiciary.

Imposition of the clear and present danger test of *Bridges, Pennekamp,* and *Craig* upon the conduct of an attorney would nullify this very first and important canon of ethics by which all attorneys are bound. The rejection of the clear and present danger test by the court below can be deemed improper only if this Court is willing to emasculate the basic duty of the lawyer to the courts which this canon enunciates. But this Court has indicated in *Theard* that a lawyer is bound by reasonable rules of court and his conduct cannot be as unbridled as that of a layman's:

> ". . . The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals. '"Membership in the bar is a privilege burdened with conditions" (*Matter of Rouss,* [221 N.Y. 81, 84, 116 N.E. 782, 783]). The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.' *People*

> *ex rel. Karlin v. Culkin,* 248 N.Y. 465, 470-471, 162 N.E. 487, 489. The power of disbarment is necessary for the protection of the public in order to strip a man of the implied representation by courts that a man who is allowed to hold himself out to practice before them is in 'good standing' so to do." *Theard v. United States,* 354 U.S. 278, 281.

This tribunal has also made it clear that it will unhesitatingly protect counsel in fearless, vigorous and effective performance of advocacy on behalf of all persons though identified with unpopular causes. "But it will not equate contempt with courage or insults with independence. It will also protect the processes of orderly trial, which is the supreme object of the lawyer's calling." *Sacher v. United States,* 343 U.S. 1, 13-14. It is interesting to note that the majority and dissenting opinions did not allude in *Sacher* to the freedom of speech of the attorney-appellant therein and the clear and present danger test urged herein.

Fisher v. Pace, 336 U.S. 155 (1949), involved an attorney who exceeded the bounds of permissible arguments to the jury and who persisted in arguing the points held inadmissible, despite the court's admonitions. To follow the First Amendment argument of petitioner herein to its utmost logical and under such circumstances would be to lead to the conclusion that First Amendment rights were involved as to invoke the clear and present danger rule. But this Court saw "nothing in their [Texas Supreme Court's] opinion or conclusion that indicates any disregard of peti-

tioner's rights." *Id.* at 162. It quoted with approval, the state supreme court's opinion that the trial judge's rulings are subject to review in the appellate courts, but the trial judge has the power to make such rulings, right or wrong. ". . . 'If they are erroneous the injured party has the plain, simple and adequate remedy of appeal. It was thus the duty of counsel to abide by his decisions even if erroneous; and if any rights of his clients were violated the remedy was by exception and appeal. Any other procedure would result in mockery of our trial courts and would destroy every concept of orderly process in the administration of justice.' " *Id.* at 162. The constitutional protection of free speech was never in issue.

Petitioner, in the instant case, would be bound by the same restraints approved by this Court in *Fisher.* The courtroom, as stated by the majority below, during the progress of a trial, is the only proper forum for a lawyer to vindicate his clients. (R. 562.) Whether it be to the face of the judge personally in open court or before a public gathering eager to hear about a trial in progress, petitioner's speech is censurable and actionable conduct.

And such restraint against petitioner is proper without reference to any constitutional right. The power to discipline an attorney is incidental to the local court for the maintenance of the respectability of the bar and preservation of its harmony with the bench. *Ex parte Burr,* 9 Wheat. 529. This Court recognized this important status of a local court in determining the fitness of an attorney to remain a member

of such local court in *Selling v. Radford,* 243 U.S. 46. In that case, this Court chose to permit the respondent to file the records of the state court (the Michigan Supreme Court which disbarred him from practice in Michigan for professional misconduct) to point out any ground, within the limitations set, which would prevent this Court from giving effect to the conclusions of the state court to disbar respondent from the Bar of this Court. This Court viewed the conclusions of the state court to be controlling as far as the respondent's disbarment from practice in the state court was concerned. It recognized the absence of fair private and professional character inherently arising as the result of the action of the state court, subject only to certain limitations, as far as respondent's disbarment from practice in this Court was concerned. The filing of the state court record was permitted, not to question the validity of the state court's conclusions which led to disbarment from state court practice. It was permitted only to determine the basis for disbarment from practice before this Court. See also *In re Isserman,* 345 U.S. 286, 348 U.S. 1.

Most recently in *Theard,* this Court recognized the sanctity of local state disbarment proceedings. As stated in *Theard,* "It is not for this Court, except within the narrow limits for review open to this Court, as recently canvassed in *Konigsberg v. State Bar,* 353 U.S. 252, and *Schware v. Board of Bar Examiners,* 353 U.S. 232, to sit in judgment on Louisiana disbarments, and we are not in any event sitting in review of the Louisiana judgment." *Id.* at 281. The narrow

limits for review involved in *Konigsberg* and *Schware* do not encompass the case at bar.

The standards imposed by the courts below are not as "protean" as petitioner suggests. (O.B. 58.) The restraints are against attacks which impugn the integrity of a presiding judge and against such unjust criticism and clamor which create disrespect for the courts of justice and judicial officers. The restraints are not restraints designed to "import a relationship of subordination and consequent loyalty . . . which is wholly incompatible with an independent bar." (O.B. 58.) They have no "real roots in 'atmospheric considerations' generated by her representation of the Smith Act defendants." (Amicus Br., 5) nor are they restraints directed arbitrarily upon one "who has courageously represented the underdogs in a semi-colonial society." (Amicus Br., 5.) They are merely in consonance with the first canon of ethics. They simply echo the restraints which all members of the legal profession have honored from the time of Mr. Chief Justice Marshall and Mr. Burr.

C. The holding of the disciplining court, affirmed by the court below, that petitioner's repeated interviews with and interrogations of the juror, Fuller, was gross misconduct is supported by the evidence and by applicable law.

Paragraph III of the complaint of the Bar Association of Hawaii, *inter alia,* charged that the petitioner did "shortly after rendition of a verdict therein visit a juror who was known by her to be indisposed, and thereafter submitted her affidavit concerning an interview with said juror to the presiding judge under

circumstances indicating a failure to comply with standards of professional conduct required of practitioners of law licensed to practice before this Court." (R. 4.)

This charge is amply supported by the evidence adduced during the hearings below.[11] The record pictures a spectacle of petitioner, with her client, Jack Hall, Joseph Kealalio, president of the I.L.W.U., and Grace Oshiro, an I.L.W.U. steward, together with Ellen Cabreros, an I.L.W.U. member, in tow, harassing an admitted "gravely ill" man (R. 39) with searching and pointed examinations on three consecutive days. (R. 39, 42, 46.) Scrutiny of petitioner's affidavit and the testimony of record not only affirms the charge of the Committee but also sustains the finding of the lower courts that petitioner grossly misconducted herself. While some of the evidence and testimony are conflicting, a convincing showing is made that petitioner did resort to studied inquiries and searching examination of juror Fuller, despite his then condition.

Her affidavit, on its face, reveals this fact. Her affidavit, made under oath, indicates that this juror who had to be quieted down and put to bed by his wife and Jack Hall on the day he was interrogated (R. 45), gave a lucid, organized running account of everything that purportedly happened in the jury

[11] Respondent is in accord with the court below that in the event the punishment on the Honokaa speech charge is reversed, the juror charge should be referred back to the territorial court to determine the sanction to be applied. (R. 568.)

room. According to petitioner, this juror said that (1) he believed he had to vote guilty to protect his brothers' jobs (R. 43); (2) it wasn't right to look at the government's exhibits and not at defendants' (R. 43); (3) it was a frame-up and he blamed himself (R. 43); (4) the jurors never got around to looking at defense exhibits (R. 43); (5) he knew and believed defendants were innocent all the time but was afraid of what would happen if he voted not guilty (R. 43); (6) the jury decided that the Communist Party was a conspiracy within the first hour of deliberations (R. 43).

(7) They used a certain instruction of the judge with reference to a conspiracy (R. 43); (8) he knew from what he heard that the defendants were convicted before the case started (R. 43-44); (9) he heard two jurors tell the judge they were opposed to Communism during the examination (R. 44); (10) no secret ballots were taken (R. 44); (11) some jurors said the government wouldn't bring the charge if it were not true (R. 44); (12) he heard it said that if the defendants weren't convicted it would affect Hawaii's statehood chances (R. 44); (13) jurors on the side of the government said any member of the Communist Party must know its purposes and is guilty (R. 44); (14) jurors on the defense side asked for Kawano's testimony (R. 44);

(15), one juror said "a number of times" that he had to go to the mainland and that they should get it over with (R. 44); (16) if he voted for the defendants it would hurt his family (R. 44); (17) one of

the jurors played cards in the jury room (R. 44); (18) there was anger and shouting in the jury room (R. 44); (19) prosecution jurors got angry with those who were holding out (R. 44); (20) no secret ballot was taken, but anybody on the defendants' side had to speak up and the others would "try to get them to back down" (R. 45); (21) jurors talked about Attorney Gladstein and said he was too smart and had defended Communists in New York, and had served a jail sentence (R. 45); (22) some jurors talked about the war against Communism (R. 45);

(23) jurors didn't consider the character evidence for the defendants (R. 45); (24) the second thing decided was that all defendants were members of the Communist Party (R. 45); (25) the next thing decided was that if they were Communists they must have intended to overthrow the government (R. 45); (26) he, himself, did not believe Kawano and he heard others say they did not believe Muller (R. 45); (27) he heard jurors talk about sabotage and espionage (R. 45); (28) they used a certain instruction on whether there was a conspiracy and they decided "right off" that there was (R. 45); (29) they talked about whether defendants were members of the Communist Party (R. 45); and (30) there was a lot of talk about Bailey. (R. 45.)

This detailed listing of all of the purported statements of this admittedly "gravely ill" (R. 39), "emotionally disturbed" (R. 423), "disoriented" (R. 259), and "mentally disturbed" (R. 262) juror glaringly illuminates some critical points. It seems incredible

that this logical and carefully thought-out story fell from the lips of this sick juror whose voice "was still only a whisper" (R. 38). It lends credence to the lack of compliance with standards of professional conduct in the circumstances.

Taking the affidavit on its face, it sems odd that the word "frame-up" allegedly uttered by the juror Fuller was never mentioned in petitioner's affidavit. Much of the argument and excuse for petitioner's presence at the Fuller home and her so-called investigation to protect her client and the court (O.B. 65) is based on the purported utterance of the word "frame-up" by the sick juror. Petitioner sought to establish that the word "frame-up" was uttered by the juror himself. Her two I.L.W.U. witnesses, Ellen Cabreros and Grace Oshiro, strove mightily to put this word into the juror's mouth, but with confusing and evasive references to having heard it yelled and/or whispered (R. 332-333, 350, 372-374, 379-380). Jack Hall did not at any time remember that the word "frame-up" was ever used by the juror. (R. 385-426.) Petitioner herself tried first to establish that the juror's wife told her that the juror said "frame-up" and then said that she herself heard him say "frame-up." (R. 476-477.) Yet, when reminded that such an important word was lacking in her affidavit, she made a feeble explanation of this oversight. (R. 477-478.) We submit that the argument, again in retrospect, that information of a "frame-up" sent petitioner, with her entourage of I.L.W.U. personnel, scurrying to the Fuller home takes on a hollow ring. Even, assuming

the truth of the affidavit, it lends added weight to the finding of the disciplining court that petitioner made repeated visits and studied interrogation of the sick juror under the circumstances as set forth in her affidavit, contrary to *Rakes v. United States,* 169 F.2d 739 (4 Cir. 1948) and other related cases.[12]

The testimony of Jack Hall, petitioner's client in the *Fujimoto* case, supports the finding of the disciplining court that the *Rakes* rule was violated. He testified that "We would ask him [Juror Fuller] a question, or I would ask one or Mrs. Bouslog would ask one, and he would think a long time and very faintly give us replies, practically in a whisper" (R. 415); that he and petitioner questioned the juror about "half-half. We were developing a particular subject, and she would ask a question and I might ask another one along the same general lines, and he volunteered a few things from time to time." (R. 416); that they questioned the juror about everything because he was "firmly convinced that the jury wasn't considering the evidence in the case nor following the instructions of the judge; otherwise, they would have been out a much longer period of time. I felt that there were persons within that jury that were anxious to get it over with and didn't care about the evidence, and I wanted to see if I could be supported." (R. 416); that the juror "talked more in response to questions than volunteering information. We were

[12]The other point raised by petitioner that the conduct here occurred in a federal case in a federal court and that this is no local matter for the local court and bar (O.B. 65) is answered in Point II, *supra.*

trying to refresh his memory." (R. 417); that most of the answers and information the juror gave were in response to questions put by either petitioner or Hall and that when the juror "would sit silent for awhile we would ask him about a particular matter." (R. 418.) Apparently, all that appears in petitioner's affidavit is not the complete extent of the "information" elicited from the sick juror since Mr. Hall testified that he and petitioner asked the juror "questions, I'm sure, that don't appear in the affidavit." (R. 422.) This foregoing testimony of record shows that petitioner, in conjunction with her client, engaged in a searching and pointed interrogation of a juror who obviously was in a poor mental and physical state.[13] (R. 422.)

The ruling of the courts below is grounded in sound law. As stated in the *Rakes* case, *supra*, "The inviolability of the jury room from outside influence of any sort, actual or potential, is a prime necessity in the administration of justice." *Id.* at 745. The courts below properly condemned the "searching" and "pointed" examination of the sick juror herein. Interviews of jurors even to discover what was the course of deliberation of a trial jury are also properly condemned. *Northern Pacific Railway Company v.*

[13]Note also the curious way in which petitioner and Jack Hall were brought into the Fuller incident, according to the testimony of Ellen Cabreros, an I.L.W.U. shop steward and sister of the juror Fuller whose visit to her brother's house was the first in one or two years. (R. 330, 334-339, 352-354.) Note also the finding of the Ethics Committee that petitioner "did not fully disclose to the Court the condition of Mr. Fuller, nor the fact that she had attempted to get affidavits from Mrs. Fuller, who refused to sign one, and could not get an affidavit from Mr. Fuller because of his condition." (R. 15, 495-504.)

Mely, 219 F.2d 199 (9 Cir. 1954); See Canon 23, American Bar Association Canons of Professional Ethics.

This Court has dealt with the conflicting considerations between redressing the injury of a private litigant and inflicting grave injury to the jury system by permitting a post verdict invasion of the jury room. Better considerations favor the general rule of preventing such invasion. As stated by this Court in *McDonald v. Pless,* 238 U.S. 264, 267:

> "But though Rev. Stats. § 914, does not make the North Carolina decisions controlling in the Federal court held in that State, we recognize the same public policy which has been declared by that court by those in England and most of the American States. For while by statute in a few jurisdictions, and by decisions in others, the affidavit of a juror may be received to prove the misconduct of himself and his fellows, the weight of authority is that a juror cannot impeach his own verdict. The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room."

The distinction between "overt acts" and "personal consciousness" in determining the applicability of the general rule against impeachment of verdicts by

jurors urged by petitioner is not supported by the later pronouncements of this Court (O.B. 66). Petitioner cites *Hyde v. United States,* 225 U.S. 347 and *McDonald v. Pless,* 238 U.S. 264 for the proposition that the general rule against such impeachment is applied only to matters pertaining to the juror's "personal consciousness" or "thought processes" but not to "overt acts." *Hyde* involved jurors allegedly making an agreement to exchange the conviction of one defendant for the acquittal of another and vice versa. *McDonald* allegedly involved a definitely overt act of arriving at a money verdict by having each juror write down what he thought plaintiffs should recover and dividing the aggregate by 12 and awarding the quotient to the plaintiffs. Clearly, this attempted distinction is unfeasible. The salutary public policy buttressing the rulings of *Rakes* and *Mely* cannot and should not be distinguished on this basis. The all-pervading and historic consideration herein is the preservation of the jurors' privilege to return a verdict freely according to their conscience. Cf. *Clark v. United States,* 289 U.S. 1. Truly, it is incumbent upon the courts to protect jurors from the "studied inquiries" and "searching or pointed examination" such as petitioner engaged in; more so, in view of the physical and mental condition of the juror which was obviously apparent to petitioner. This was not, as petitioner now defends, an inquiry into Juror Fuller's mental imbalance while serving as a juror. (O.B. 67-68.) It was interrogation and examination of the type that can justly be condemned as gross misconduct.

The admissibility or inadmissibility of the facts gathered is not in question here. It is the misconduct of petitioner which was the sole basis of the holding below. And such holding, it is submitted, is supported by the evidence and is premised on sound law.

CONCLUSION.

Upon the foregoing, it is respectfully submitted that the judgments of the courts below should be affirmed.

Respectfully submitted,

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(Appendix Follows.)

Fear

"The only thing we have to fear is fear itself - nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance."

Franklin D. Roosevelt

Published by

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION

HONOLULU, HAWAII

Foreword

Labor Attorney, Harriet Bouslog Sawyer was guest speaker to Kauai union members and their friends on Labor Day of this year. Her theme was the inherent right of the American people to disagree with the policies of government.

The liberty of all people is in jeopardy, she pointed out, when any segment of society is prosecuted and jailed for expressing opinions. Those who are loosing their liberty today under the Smith Act are being persecuted for exercising their rights "to criticize, to dissent, to hold unpopular ideas." The Labor Day speaker did not approve or disapprove of the ideas expressed by those who have been arrested under the Smith Act. Again and again she emphasized, that the issue today is not what is advocated, but rather the right to advocate.

If today people holding unpopular political ideas are jailed, then, the labor attorney pointed out, no section of society can escape for long.

She made a blistering attack on the National Administration and quoted from a recent edition of Look Magazine, in which a feature story brands the Truman Supreme Court as being "incompetent, indolent and irresponsible."

The International Longshoremen's & Warehousemen's Union reprints the 1951 Labor Day address of Harriet Bouslog Sawyer as a public service; as a warning to all people in Hawaii that it is later than some people think.

Mrs. Harriet Bouslog Sawyer

Brothers and Sisters:

On this Labor Day, September 1951, the rights, the living standards, and the hopes of all of you, for yourselves and your children, are in danger. The seriousness of this danger was made clear to all of us by the arrest, on August 28, of seven persons, all of whom are known to us personally or by reputation.

The attack upon the liberties of all working people and true democrats did not, however, begin with the arrest of these seven. It is a course and policy that has been followed by our government since the death of Franklin D. Roosevelt. These seven are a part of a whole national pattern which shows that the people in power in our country today will not tolerate any criticism or attack upon their announced plan to make America and the world an armed camp. As a part of this plan, they have frozen wages while prices and profits soar. They have tried to infect all of us with hate and fear.

Among the group of seven who are charged with conspiring to advocate and to teach the overthrow of the government by force and violence is Jack Hall. All the people of Hawaii know his record. All workers in Hawaii and all honest persons know that he has devoted his life wholeheartedly to helping labor during the whole time he has lived in Hawaii, since 1935.

Few Against Many

At first, he and a handful of others struggled alone to organize unions against the powerful opposition of the Big 5, who did not hesitate in their struggle to use all arms of government—police, the legislature, and the courts—to interfere with every attempt to organize a successful union.

You remember him when his powerful voice was raised in the Voice of Labor and Kauai Herald against the oppression of workers in Hawaii. That was in the days when you were earning less than two dollars a day for your toil—the days you had to take chickens to the lunas to be sure to keep your job. There is not in Hawaii today a worker, a luna, a businessman whose standard of living and human dignity is not greater because of him.

It is not hard for any of us to figure out why Jack Hall is hated by employers in Hawaii, and by politicians in Hawaii. It is more difficult, perhaps, for us to understand why it is that representatives of the government of the United States brand a man, who has contributed so much to bringing the dignity of a human being to the workers of Hawaii, "one of the 63 most dangerous persons" in the United States.

Democracy in Action

All of us know that the trade union movement, the ILWU, in Hawaii brought democracy to the workers in Hawaii for the first time.

Whenever I think of democracy, I think of a meeting I attended at Lahaina, Maui, in November 1946 at the end of the 79-day sugar strike. The meeting was to consider whether the Lahaina unit would go back to work under the agreement reached as to the other units, while the Pioneer Mill Company refused to re-employ eleven of the Lahaina strike leaders who had been charged with unlawful assembly and riot.

There were 600 to 700 people at that meeting. They were people who had been through 79 days of strike. They were people whose children needed shoes and clothes and food.

Everything said at the meeting was translated into three languages. No less than 40 or 50 people spoke. To a man, those union members voted to refuse to return to work until those eleven men were guaranteed reinstatement without discrimination.

Standing beside me at this meeting was a person who had lived in Maui County and in Hawaii for most of his life. The tears rolled down his cheeks. He said: "That's the first time I ever saw democracy at work in Hawaii."

You and I and all of us know that the union for the first time brought real democracy to the islands in the daily working lives of the people. You have never been taken in by the newspaper and employer accusations that a handful of men run this union, because you yourself have participated in the making of union policy and decisions. It took the united action of 20,000 working people to win the sugar strike.

The Plot Begins

How does it happen, then, that the government of the United States calls a man who has contributed so much to bringing democracy to Hawaii, a dangerous person?

The plot began right here in Hawaii with the red-baiting and cries of communism against labor by employers and the local press, by those who feared statehood. It was built into a fire of frenzy by politicians who betrayed the workers who put them in office. The ILWU-hating governor, Stainback, who smeared the working people of Hawaii in the nation's capital and through the nation's headlines in order to keep himself in office, fanned the flame to white heat. Gasoline was poured on the fire by the IMUAs, the Kauhanes, the Sylva Committee, the Butlers, the Un-American Committee. Then along came disgruntled, ex-labor leaders, the Izukas and the

Kawanos, spurred on by hypocritical politicians who wooed labor's support with sweet words to get in office, and who stabbed labor in the back when they thought it was to their personal advantage.

With the fires already lit and burning brightly, the national administration could not resist seizing upon the prosecution of Hawaii's seven as the next step in building up national hysteria and fear. Hawaii is a natural for such a purpose. Here, World War II started with the Japanese attack on Pearl Harbor. It is the jumping-off place for troops in Korea. A charge of spies and subversives in Hawaii, the national frontier, is a cinch to frighten even peace-loving people not yet stampeded into hysteria and fear.

Most Americans know so little of Hawaii. Mainlanders do not know and most likely never heard of any of the seven. No one on the mainland could catch the lies, no matter how big. It is our job to make all Americans know that these seven are persons of integrity and honor; that any conspiracy is a conspiracy against them and us.

Conform or Else

The prosecutions come about because Jack Hall and persons like him throughout the United States, have dared, individually and as trade unionists, to criticize the policies of government.

The reason for the prosecution of Jack Hall is the same as that for the prosecution of Harry Bridges; of Henry Schmidt; of Bob Robertson. If these attempts succeed prosecution of all militant trade unionists will follow, until the government silences all who dare to challenge the right of the government to freeze wages, while prices and profits soar; who demand peace when the government is bent on war.

The government, in order to carry out its policies, must have something—some means of building up hysteria and fear and an acceptance by the people of the idea of living in an armed camp for the next several generations.

Thus, the government has, in a deliberate and long-standing policy, built up a bogey-man in the United States, of reds and Communism.

But something had to be done to those people who refused to be stampeded. Criticism had to be silenced in all its forms, and so a campaign of fear was instituted—fear of job security, if any criticism were made—fear of arrest—fear of prosecution—fear of speaking out and speaking one's mind.

Franklin Roosevelt once said: "We have nothing to fear except fear itself." We can now realize the great wisdom of Roosevelt—now that our country is ridden and haunted with fear in all places, high and low.—

The elected representatives of the people in power today were elected because they shouted loud and long, as they stumped the country, of their great love for the working man. They promised him repeal of the Taft-Hartley law, low-cost housing, a national health act. They promised to defend the peace of the world. They promised a civil rights program to stamp out vicious racism and discrimination. Not one of their promises have they kept. Instead, they have given the same workers who elected them wages freezes while they admit inflation is out of hand. They have involved us in war, not as provided in the Constitution by declaration of Congress. One man, President Truman, threw us into war. In direct violation of the Constitution, our sons have fought and died on the battlefields of Korea.

Unlawful Lawmen

The FBI has been one of the chief tools in carrying out this program of fear and hate. Its tactics are more appropriate for a thought-police in an undemocratic state than an agency whose primary function is supposed to be to detect violations of federal law. This agency, with the knowledge of the President, the Attorney General, and the Congress, defies federal law and constitutional rights. It collects rumor and scuttlebutt which is used to fire workers. The nature of its reports, when revealed in cases in the federal court, shocked the nation.

We know of the unlawful conduct of the FBI here in Hawaii. We know and can prove that they have placed dictaphones in homes, have unlawfully tapped telephones, have seized personal books and papers without search warrants, have used threats and intimidation against persons who have refused to become stool-pigeons and informers. We can and will prove these things.

First, with the help of the FBI, the administration directed its campaign of fear and intimidation against government workers, then towards unpopular political groups, then towards trade unions, and now it attacks all who oppose it. The present administration is rotten and corrupt with bribery and gangsterism, according to government reports. The trusts become larger and larger, but are not prosecuted. Civil rights act violations are ignored.

The administration just has to keep beating the drums of hysteria to keep attention away from itself. It is like the thief running down the street, pointing and crying "thief." The only time great freedoms and constitutional rights are remembered is when the president and his cronies cry out with injured innocence when jackals like Senator McCarthy use against them their own weapons of the big lie and the red smear.

Let us look at the technique of these prosecutions. It closely follows the fascist technique.

In the year 1945, in the case of the Communist, William Schneiderman, the U. S. Supreme Court said that it found no evidence sufficient to find that the Communist Party advocates the violent overthrow of the government of the United States. It further said that an American Communist like William Schneiderman could be devoted to the Constitution of the United States. Clearly, a court composed of men who believed this did not fit into the plans of the administration. So, as justices died or retired, they were replaced with men with wholly different views. Five years later, the Supreme Court packed with Truman appointees, reached the opposite conclusion and upheld the conviction of the eleven Communists.

Incompetent, Indolent, Irresponsible

Here is what Fred Rodell, Professor of Law at Yale University, says of the present court, in the July 31st issue of Look Magazine. I quote:

"The Supreme Court of the United States today belies its awe-inspiring title. Degraded by President Truman's devil-may-care appointment of four justices whose work has ranged from mediocre to miserable, the Court has sunk to its lowest point in a hundred years.

"When Truman chose Harold H. Burton, Fred M. Vinson, Tom C. Clark and Sherman Minton, it was clear that their major qualification for the nation's top judicial jobs was that they were old cronies of the President. Today, it is clear that a nine-man Court weighed down by so sad a quartet either cannot or will not properly perform its high function . . . the Truman-Vinson Court, judged both by the quantity of work it takes on and by the quality of its work has branded

itself, conservatism aside—as incompetent, indolent and irresponsible."

The Attorney General, empowered by Congress, makes up a black list, perhaps I should say "red list." For belonging to organizations on this list, a worker in government, on the ships, on the waterfront and sometimes, where there is no union contract in private employment, can be and most frequently is fired. The organizations on this black list are not given a hearing or a trial; they are not informed of charges against them. In direct violation of the Constitution and the Bill of Rights, this has been the practice of our government during this terrible era.

First the government says the Communist Party advocates the overthrow of the government, by force and violence. Congress passes laws saying the Communist Party does. The radio, the press and the politicians shout it from the housetops, so loud and long that no one listens to the denials. Everyone is even afraid to disagree with the government. If a person says he does not think the government is right, if he points to a decision of courts, or anything that is in conflict with what the government has announced, he too is branded red by the mere fact that he disagrees. He may even be fired as a fellow-traveler or communist sympathizer, or a poor security risk, if he does not say repeatedly over and over that the Communist Party is subversive and its members should all be behind bars. Keeping his mouth shut and keeping his ideas to himself is not enough.

Every person convicted under the Smith Act has flatly denied that he believes in or advocates the violent overthrow of the government. He points to the Constitution of the Communist Party, which says the achievement of socialism by lawful and peaceful means is the objective.

They Promised — But They,

Repeal Of Taft Hartley!

But

Used Taft Hartley To Break Strikes And Weaken Unions.

Peace

But

War

Low Cost Housing

But

Wrecked Rent Control!

How does the government, in the legal hanging technique, prove its point? Here is where the stoolpigeon, the professional witness, the political opportunist, the renegade, the Izukas, the Kawanos, come in. They announce that they were once Communists, and that when they were Communists, they were terrible people who engaged in all sorts of illegal activity, but now that they have seen the light, they would like to help the government put behind bars all their former associates whom they now hate. They are paid with publicity, with witness fees, with royalties from their books and pamphlets. One of these stoolpigeon-informers, Mr. Izuka, once testified that he directed a slow-down at Port Allen to hold up lend lease ships. No lend lease ship ever docked on Kauai, but no lie is too big for these stoolpigeons or the government prosecutors.

There is no way of proving what ideas a man has in his head except as he tells them. Even after a man is dead, an autopsy on his brain doesn't reveal what he once thought.

A story illustrates the point. Once in contract negotiations, a business agent was accused of being a Communist. He denied it. Then the employer who accused him scoffed and said a Communist always denies being a Communist. The business agent then accused the employer of being a Communist. The employer angrily denied it. "By your own logic," said the business agent, "You have just proved that you are a Communist."

The story trade unionists like best, however, is the story of the picket who was attacked by a cop. To stop the cop from hitting him over the head, the picket cried out, "But I'm an anti-Communist." "I don't care what kind of a Communist you are," the cop said, as he kept on using his club.

After the government's campaign to force everyone to believe that Communists are subversive was in high gear and everyone who disagreed almost was afraid to say so, the government started its prosecutions of Communists and trade unionists accused of being Communists. It didn't make any difference, by this time, what the accused Communist said. Everyone was afraid to listen to what he said. Judges, to stay in favor and to be promoted, join in the witch hunt. Jurors are afraid to disagree because they too might be branded as red. Thus the political trial—the witch hunt 1951 style—has been perfected.

Trade unions and working people all over the country and in Hawaii are the last to give in to hysteria because of their long experience of being red-baited every time they ask for more pork chops.

But certain so-called labor leaders went along with the

hysteria built up by the government, and the house of labor was divided. We are therefore in the darkest days of our hysteria, because we do not have one united trade union movement to oppose the fear, hate and war campaign of the government.

Silence the Opposition

In addition to the trade unions, the government finds it necessary to attack and brand as subversive newspapers which dare to speak out in critical terms of its policies.

I don't suppose there are many people here who have not read the Honolulu Record. We all know that the Record filled a need in Hawaii. What the people of Hawaii need, really, is a daily newspaper with honest reporting of facts, but the best the Territory has been able to achieve is the weekly newspaper, the Honolulu Record.

Freedom of press in this country has become a matter of having one million dollars to start a newspaper. The people who really believe in honest reporting so that people would have the facts, don't have that kind of money.

Two of these seven defendants are employed by the Honolulu Record. One, Koji Ariyoshi, advised the U. S. District Court that he was the managing editor of the Honolulu Record; that his salary was $200 a month; that he had no cash on hand except the $20 he had given his wife upon arrest.

Koji Ariyoshi was born in Hawaii, on the Big Island. He was raised on a coffee farm. His parents had been sugar workers in the days of brutal treatment of workers before there were unions. He served five years in the United States Army in the Intelligence Unit. He is considered even by the commercial newspapers in Hawaii a newspaperman of outstanding ability.

He is a product of Hawaii. He voluntarily chose to edit a newspaper which presented the truth, for $200 a month, rather than to work where he would have to go against his ideas at double or triple his present salary.

Yet, the Attorney General of the United States describes this man, who engages in the publication of a newspaper, as "one of the 63 most dangerous" persons in the United States.

Likewise, Jack Kimoto, who, as an employee of the Honolulu Record, makes $170 a month, is called "one of the 63 most dangerous" people in the United States. He, too, is a product of Hawaii, and a long-time local newspaperman. Physically unable to serve in the Army, he served his country in the OWI as translator and Japanese language broadcaster.

What happens to the Bill of Rights when the government of the United States charges in an indictment that publishing and circulating a newspaper containing reports of facts and editorial comment, is a part of a conspiracy to overthrow the government?

The Honolulu Record is given the use of the U. S. mails. It is sold on news stands. It is a strange charge of conspiracy that is based upon the publication of a newspaper, particularly when the very most basic provision of the Bill of Rights is that Congress shall make no law abridging freedom of speech or of the press.

Now, if Congress can make no law abridging freedom of speech and of the press, how does it happen that publishing a newspaper can come to be part of a conspiracy for which one may be subject to prosecution with possible 5 years imprisonment and a $10,000 fine?

Also charged in the indictment is Charles Fujimoto, who has announced that he is chairman of the Communist

Party in the Territory of Hawaii, and who has issued press statements as chairman of the Communist Party.

Charles Fujimoto grew upon the island of Kauai. He did not feel that the democratic rights he learned about in school were being given to his fellow citizens. He was fortunate enough to be able to go to college, and the more he learned, the more he became convinced that the great guarantees of freedom that existed on paper, were not put into practice in Hawaii. And so, according to his own conclusion of what would help the working people, he announced to the world that he advocated socialism as better for workers than capitalism.

Now, there is nothing in the United States Constitution that says capitalism and democracy are the same.

Since 1848, when the Communist Manifesto was published by Karl Marx, there have been advocates in the United States of the doctrine known as Marxism, but not until the present government campaign and the cases of the eleven Communist leaders in New York, and the other 63 persons now charged, has the government deemed it necessary to suppress dissenters; that is, people who do not think capitalism is the answer for the people of the United States.

And so it comes about that Charles Fujimoto, who grew up on the island of Kauai, whose opinions and beliefs come from observing the plantation system at work in the Territory, and capitalism at work in the Territory, achieves the great prominence of being selected as "one of the 63 most dangerous" persons in the United States. He is labelled "dangerous" because of his ideas. He is prosecuted for those ideas.

All of you know of John Reinecke. For 20 years, he and his wife were faithful public servants—teachers in the

public schools. Then Governor Stainback chose him and his wife for the first whipping-boys in the red smear campaign. Our law offices represented John and Aiko in their hearing. The Attorney General of Hawaii was forced to admit he had no evidence of any kind to attack either of the Reineckes as teachers. They had to admit that they were fine and outstanding teachers; that whatever their beliefs were, they had tried to teach their students how to think, not what to think. The crime of the Reineckes was their walking on picket lines, and their constant association and help to workers.

Eileen Fujimoto—the wife of Charles Fujimoto—is known to many of you. She, too, was born in Hawaii. For eight years she has been a faithful and efficient secretary to the ILWU. She is prosecuted, among other reasons, because she associates with her husband and is accused of sharing his ideas. Can this be a crime in the United States? I think not, in the kind of America you and I want.

James Freeman is a worker like all of you. Even the chairman of the UnAmerican Committee had to agree that he served his country well during World War II as a member of the Seabees at the Philippines front. All his life, he has been either a worker or a labor organizer of agricultural workers and of construction workers.

There is not one of these seven defendants who did not grow up in, and is not the product of America. Four were born and have always lived in Hawaii. What they learned, they learned in American schools; they learned by observing in the United States. Their ideas were based upon what they saw and felt.

Can we not, in the United States, disagree with a person and yet defend his right to have ideas in conflict with ours? Must we all think alike and accept as gospel

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what we are told, or else be labelled "subversive"? That is not my idea of Americanism.

Several weeks ago, a story came out in the newspapers that the ink on the Declaration of Independence and the ink on the Constitution of the United States, including the Bill of Rights, was fading. A great concern was expressed because this ink was fading, and these documents were embalmed in chemicals so that the ink would not fade further.

The danger in the United States today is not that the ink on the Declaration of Independence is fading, or the ink on the Constitution and Bill of Rights is fading. The danger is that officials of government are destroying the substance of these documents.

Subversive?

In several places throughout the country, recently, newspaper reporters have tried an experiment. They have made up a petition containing parts of the Bill of Rights and parts of the Declaration of Independence. The common ordinary citizens who were asked to sign these petitions refused to do so. Some of them labelled the circulators of the petitions "Communist." Some of them said they were afraid to sign for fear they would lose their jobs.

When we get to the place in the United States of America where our people are afraid to sign the basic documents of our liberty for fear that the government will punish them for doing so, we have already lost our liberty and now we must put up the fight to get it back.

The Declaration of Independence, adopted in Congress July 2 and signed July 4, 1776, says:

"We hold these truths to be self-evident: that all men are created equal; that they are endowed by their

Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness."

How can the prosecution of individuals on a charge of advocating and teaching socialism be squared with the Declaration of Independence, and the right to freedom of speech and of conscience?

At the time when the Congress of the United States adopted the Declaration of Independence, they too were

IN THE

Supreme Court of the United States

October Term, 1958

No. 326

In the Matter of Disciplinary Proceedings against HARRIET BOUSLOG SAWYER, a Member of the Territorial Bar of the Territory of Hawaii,

Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER.

Preliminary.

1. On the effect of the judgment suspending petitioner for one year, respondent attempts to distinguish such a suspension from disbarment by saying that reapplication "would be as a matter of right after the expiration of the period of suspension." (R. B., 2.)[1] According to Rule 15(d) of the Territorial Court (O. B., App., 84),[2] petitioner's only "right" upon completion of the suspension will be to take "an examination as though applying for admission to the Bar." Thus, after eighteen years of service at the Bar, with a distinguished record unblemished except for the charges involved here, petitioner will

[1]Respondent's Brief will be referred to as "R. B."

[2]Petitioner's opening brief will be referred to as "O. B."

branded "criminals." Our forefathers thought it basic to our country that thenceforth this right be guaranteed to all Americans. Thus, with this in mind, the people of the United States insisted on a bill of rights—a bill of rights which guarantees freedom of speech, freedom of thought, freedom of assembly, freedom of the press, freedom of religion, the right of persons to be safe and secure in their houses and papers, the right to a fair hearing and a fair trial—all of these rights which we are taught in school are basic to America.

Yet the government itself has overthrown these rights and refused to make them apply to persons whose ideas are unacceptable to them.

The Supreme Court of the United States has already upheld the conviction of 11 leaders of the Communist Party in New York. Two justices only dissented from that decision. Those two, Justice Douglas and Justice Black, said in clear and certain language that the United States government was doing more to undermine and overthrow the form of government we have in the United States under the Constitution, than the defendants before the court.

Even Judge Metzger!

This attack by agents of government against all who disagree with their policies is not limited to the seven defendants. The name of Judge Delbert E. Metzger is known to all of us. Judge Metzger has been a member of the legislature, a circuit court judge, and a federal judge. He has been an engineer and a private lawyer. He has been in Hawaii since 1898.

He alone among all the public officials in Hawaii, tried to preserve the Constiution of the United States during the period of martial law. He alone was not intimidated

have the same "right" as the young law student who has just received his degree.

2. Concerning the genesis of the charges against petitioner, respondent observes that "petitioner compliments herself too much in stating that the amendment of the rules[3] which are applicable to all members of the Bar was 'devised' for her own and personal detriment." Back in 1954, apparently, the president of respondent association saw things differently. At petitioner's hearing he testified that the Association's Committee on Legal Ethics had recommended a complaint be filed but under the then existing rules of the Territorial Court, the Bar Association could not be a complainant. ". . . consequently [his testimony continues] the matter was again referred to the Committee on Legal Ethics to study amendments to the rules of the Supreme Court, and the Chairman of the Committee on Legal Ethics took the matter up with the Chief Justice. And as I recall, the amendment to Rule 19 —that is, the rule on complaints for unprofessional conduct—I think was amended in April, 1954. Thereafter, the Chairman of the Committee on Legal Ethics submitted a proposed draft of the complaint . . . and then finally, the form of the complaint was, as filed, agreed upon, and I . . . was authorized to file that complaint in the name of the Bar Association." [R., 536, 537.] One is reminded of the hero of one of Lincoln's stories who, as he was being ridden out of town on a rail, observed that if it wasn't for the honor of it, he would just as soon walk.

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[3]Rule 19 of the Territorial Court. (O. B., App. 77-83); compare especially paragraph 1, page 77 with paragraph 1, page 80.

by threats of physical violence against him and his family, and issued a writ of habeas corpus to release a person charged and convicted by the drumhead military courts and the United States Supreme Courts upheld him in that decision.

Now, because he dared to fix a bail that he felt adequate to serve its purpose, namely, to guarantee the appearance of the defendants, he has been castigated by Congressmen, statements have issued from the White House, saying that he will not be reappointed, and all manner of personal attacks have been made against him.

No stronger proof could be shown than in this attack upon Judge Metzger that persons like the seven defendants are only the first in the Territory of Hawaii, and among the first in the nation, who are charged as criminals for disagreeing with the policies of the government.

If this campaign of the government to silence all opposition succeeds first among persons labelled "Communist," it will then move to militant trade union leaders, judges and others.

Do not feel safe because your name is not among the seven, because if this conspiracy of government against the seven succeeds, you and your children will have lost your liberties, and we will go again into dark ages of thought-control—thought-control against which we fought in Germany, in Japan, in Italy, and to which our government has now turned to maintain itself in power.

What can you do? What can you, as individuals, do to stop the destruction of your liberties?

The first and foremost thing you can do is to strengthen your trade union so that all of you can speak with one mighty voice, to protest, to give aid and assistance, and to demand that American freedoms guaranteed by the

POINT ONE.

The Court Below Had Appellate Jurisdiction Under 28 U. S. C. 1293 on the Two Independent Grounds That This Is a Case (a) "Involving the Constitution . . . of the United States" and (b) Wherein the "Value in Controversy Exceeds $5,000.00."

(a) This is a case "involving the Constitution . . . of the United States."

Petitioner has been deprived of her license to practice law in the Territorial Courts in a manner tantamount to disbarment. She asserts, as she did below, that this action contravenes the due process clause of the Fifth Amendment and the free speech guarantee of the First Amendment. Each of these claims raises a substantial federal question conferring appellate jurisdiction on the court below under 28 U. S. C. 1293. That statute has uniformly been held to confer appellate jurisdiction over claims that local statutes or action taken thereunder offend the Federal Constitution. *Prensa Insular v. Puerto Rico,* 1 Cir., 189 F. 2d 1019, 1020 (asserted abridgement of free press by operation of local statute on criminal libel); *Mercado Riera v. Mercado Riera,* 1 Cir., 152 F. 2d 86, 92 (action of territorial court claimed to offend Fifth Amendment in deprivation of equal protection and due process); *Romero v. Puerto Rico,* 1 Cir., 182 F. 2d 864, 867 (claim that local statute suffered from Fifth Amendment vagueness); *Colon-Rosich v. Puerto Rico* (claim of arbitrary inferences offensive to due process clause of Fifth Amendment).

Contrary to respondent's position (R. B., 25-30) the existence of a federal question does not turn on whether the professional license is a privilege or immunity belonging to federal citizenship or derived from national author-

ity. Patently petitioner's license was granted by the Territorial Court pursuant to Territorial law. (See Rev. Laws of Hawaii, 9701, O. B., 5.) The federal question arises from the manner in which that license was suspended. The cases make clear that whatever the source of the professional license and however clear the jurisdiction of the disciplining body over the subject matter, it may not act in violation of the Federal Constitution. When it does so, that action creates the federal question. No local authority which "acts under law is beyond the reach of the Constitution." *Board of Education v. Barnette,* 319 U. S. 624, 638.[4]

Whether a privilege or a right, the professional license is "liberty" and "property" in the constitutional sense. *Ex parte Garland,* 71 U. S. 333, 378-379; *In re Summers,* 325 U. S. 561, 566-569. It cannot be taken away or denied for reasons which offend either due process of law or freedom of speech. *Schware v. Board of Bar Examiners,* 353 U. S. 232, 238, 239; *Konigsberg v. State Bar,* 353

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[4]Respondent devotes nearly nine pages of its brief answering what it fancies to be petitioner's "contention that due process of law was not accorded her, in contravention of the First [*sic*] and Fifth Amendments to the Constitution of the United States." (R. B., 27-35.) Apparently respondent conceives that petitioner's claim to be that she was denied procedural due process. Petitioner has never contended in this litigation that she was denied fair notice and opportunity to be heard. Her claim of denial of due process of law (O. B., Point One, pp. 30-50) is confined to an assertion of arbitrary fact finding. She has never in this litigation raised any other due process point, and respondent's dreary recital of the procedural steps before the Territorial Court and its Legal Ethics Committee, as well as that in the opinion of the Territorial Court [R., 95-115], is quite irrelevant to any position urged by petitioner.

Constitution and the Bill of Rights be preserved for all of us.

But if you cannot get your friend, your neighbor, to join, you must still lift up your voice even if it is a voice in the wilderness, if you are to save your liberty and the liberty of your children and your fellow man.

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JAMES R. BROWNING, Clerk

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER.

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Selling v. Radford, 243 U. S. 46	10, 12
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Theard v. United States, 354 U. S. 278	10, 12
Wall, Ex parte, 107 U. S. 265	8
Yates v. United States, 354 U. S. 298	17

U. S. 252, 273.[5] In *Schware* and *Konigsberg* denials of admission to state bars were reviewed and reversed upon assertions of federal questions that included the drawing of arbitrary inferences in violation of due process and abridgement of First Amendment liberties. If the denial by a State of a license to an applicant for admission to the bar can give rise to federal questions properly presented, *a fortiori* with the suspension or revocation of the license of a lawyer already admitted.

(b) This is a case wherein the "value in controversy exceeds $5,000.00."

Petitioner's affidavit under 28 U. S. C. 2108 [R., 622] is uncontroverted. However priceless the maximum value of appellant's right to practice may be, the affidavit establishes for purposes of this proceeding the minimum value of her exercise of that right in sums larger than the statutory minimum.

Respondent contends (R. B., 21) that the value in controversy branch of the statute has no application here since petitioner's "privilege to hold her license" cannot be assigned any value. But respondent overlooks those cases

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[5]See also, anent suspension of a state medical license, *Barsky v. Board of Regents*, 347 U. S. 442, where multiple claims of denial of due process were reviewed here, conceives that petitioner's claim to be that she was denied procedural due process. Petitioner has never contended in this litigation that she was denied fair notice and opportunity to be heard. Her claim of denial of due process of law (O. B., Point One, pp. 30-50) is confined to an assertion of arbitrary fact finding. She has never in this litigation raised any other due process point, and respondent's dreary recital of the procedural steps before the Territorial Court and its Legal Ethics Committee, as well as that in the opinion of the Territorial Court [R., 95-115], is quite irrelevant to any position urged by petitioner.

holding that where the litigation does not directly involve money or some specific subject matter of ascertainable value, the test is the value of the use of the subject matter of the litigation. This principle—sometimes formulated as the value of the subject to be concluded by the decree—applies precisely in those situations where it is impossible to fix a precise upper limit on the value. This is familiar law under the cognate statutes (28 U. S. C. 1331, 1332) conferring jurisdiction upon the United States District Courts. *Hunt v. N. Y. Cotton Exchange,* 205 U. S. 322; *Glenwood Light & Water Co. v. Mutual Light, etc., Co.,* 239 U. S. 121; see also, *Berryman v. Whitman College,* 222 U. S. 334, to the effect that jurisdiction is "measured by the value of the right to be protected." Similar cases are collected in 30 A. L. R. 2d 602, 627-628, see also 621-626.

In applying Section 1293 the court below has adopted the same principle. This it did in the case at bar on petitioner's application for stay. [R., 624.] See also in *Robert Hind Ltd. v. Silva,* 9 Cir., 75 F. 2d 74. That was an appeal from a judgment cancelling a release given for $84.50. The injured party had also brought an action for $25,000 on account of his injuries. The court took jurisdiction since, "Clearly the right of appellant to use the release as a complete defense to an action for $25,000 damages exceeds $5,000." (*Id.,* p. 76.) In the related field of amount in controversy for purposes of jurisdiction of the District Courts, the court below has similarly measured that amount by the "right which appellant asserts and seeks to have protected and enforced." *Electro Therapy Products Corp. v. Strong,* 9 Cir., 84 F. 2d 766, 767.

This Court has recently held that, whatever other attributes attend the holder of a lawyer's license, he is engaged in a business. *Cammer v. United States,* 350 U. S. 399. It would therefore seem that this right is as capable of evaluation in terms of the income its exercise produces as any other business. Where the action complained of in the litigation effects the suppression or restriction of a business, the value of the right to do the business or of the injury to it is the matter in controversy. That value is measured, in the case of destruction of the business, by the total investment therein, or, in the case of restriction, by the amount of the business lost thereby. *Scott v. Donald,* 156 U. S. 107, 114, 115; *Bitterman v. Louisville and N. R. Co.,* 207 U. S. 205, 224, 225; *Healy v. Ratta,* 292 U. S. 263, 269; *McNutt v. General Motors Acceptance Corp.,* 298 U. S. 178, 181; *Kroger Grocery and B. Co. v. Lutz,* 299 U. S. 300, 301. Whatever other effect the judgment of disbarment will have upon petitioner, it will deprive her of her license to engage in business for more than a year.[6] At the very least this is what Mr. Justice Stone in *Healy v. Ratta, supra,* called "restriction" of petitioner's business. Her resultant loss thus exceeds $5,000.00, and by the cases just cited this is the value in controversy in this litigation.

The showing satisfies the jurisdictional amount prescribed in the statute.

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[6]Petitioner will not be eligible for reinstatement automatically upon the end of her suspension. Only after the year's suspension has been completed is she then able to take the "examination as though applying for admission to the bar." See Rule 15(d) of the Territorial Court. (O. B., App., 84.) Obviously much more time would pass until the examination could be given and the results obtained. Counsel are informed that bar examinations are given but once a year in Hawaii.

POINT TWO.

Respondent Misconceives Petitioner's Argument That the Territorial Court Was Without Jurisdiction and Fails to Show Why the Territorial Court Should Not Have Deferred to the Federal Court.

1. Respondent asserts (R. B., 40) that petitioner's position is in effect that "as long as petitioner misconducts herself on the federal side of the street, it is none of the Territory's business." To this we say that it depends on the kind of misconduct. We do not question the right of any licensing court to try and discipline one of its attorneys upon charges of well-defined and universally condemned offenses wherever committed. Thus, initiating vexatious and ill-founded litigation, representing adverse interests, aiding non-lawyers to practice law and participating in the mulcting of uninformed clients to carry on such activities (see *Geibel v. State Bar,* 11 Cal. 2d 412, cited R. B., 46) are such offenses. They are destructive of good character and harmful to the public interest in an honest and reliable bar. Wherever committed, and with relation to whatever court, any licensing court should initiate disciplinary proceedings against the lawyers participating.

But here the conduct is qualitatively different. Whether it is an offense at all turns on both petitioner's relationship to the federal court and the impact of her conduct upon the case in the federal court.[7] The interview, post verdict, of the trial juror was an offense only if the court where the juror served made it so. Surely it is for the federal

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[7]In addition, the gravity of the offense and the discipline, if any, needful to protect the integrity of the bar and the administration of justice (see, *Bradley v. Fisher,* 13 Wall [80 U. S.] 335, 354; *Ex parte Wall,* 107 U. S. 265, 288) most certainly would be governed by these factors.

judicial system to determine whether it will prohibit all lawyers, on pain of severe discipline, from interviewing trial jurors in the federal courts after verdict has been rendered in a case pending in that court. It is not for the Territorial Court to prescribe protections for federal jurors serving in federal cases. Such a determination involves considerations related to protecting the inviolability of the jury room and to ferreting out conduct which corrupts or otherwise beclouds the processes of justice. These are difficult and complex questions and different courts may well strike the balance between the competing interests at different points. The resolution of such issues would seem to be inseparable from the responsibility of the court wherein the conduct occurred (here the federal court) to regulate and control its own functioning.

This Court may well decide that in the federal system the fair administration of justice and the protection of accused and convicted individuals call for a rule that permits (if it does not require) lawyers to interview the trial jurors, post verdict, on any reasonable information indicating a tainted verdict. In such circumstances, for the Territorial Court to assert an autonomous power so as to prescribe for its licentiates "a standard of conduct . . . to be followed and observed by such Hawaii attorneys in any jurisdiction, local, state or federal" (R. B. 43) is *pro tanto* to usurp the federal court's power and obstruct its proceedings. The Hawaii attorney in following the federal rule in federal litigation would be disciplined by the Territorial Court. In such circumstances he would either be effectively deterred from doing what the federal courts deem necessary to their administration of justice or he would be gravely penalized for having done so. Such a state of affairs would seriously obstruct the relationship

of the federal court bar with the administration of justice in that court.

Viewed in another light, the Territorial Court's discipline of petitioner for the juror interview would create a stultifying anomaly. The federal court in Hawaii now has pending disciplinary proceedings against petitioner;[8] these proceedings rest solely upon the Territorial Court's judgment herein. Under the rule of *Selling v. Radford,* 243 U. S. 46 and *Theard v. United States,* 354 U. S. 278, the federal court will be called on to examine the record in the Territorial Court matter to determine *inter alia* whether grave reason invokes the duty "not to [discipline] except upon conviction that, under the principles of right and justice, we [are] constrained to do so." (243 U. S. at 51.) At this juncture the District Court (or its supervising courts on appellate review) might well adopt the policy concerning juror interviews urged here by petitioner. (O. B., 64-67.) Should that occur, petitioner would stand disciplined by the Territorial Court for conduct in a federal case in the federal court which that judicial system finds blameless.

Similar reasoning applies to the Honokaa speech. Since the charge was showing disrespect for the federal court, it was for that court to decide whether the speech interfered with its ability to maintain public respect or was subversive of its administration of justice. Petitioner's remarks on their face were not of this quality; she did not call Judge Wiig a crook or charge him with being the

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[8]They are referred to at R. B., note 8, p. 41, and note 9, p. 44.

tool of political interests—utterances which, like the offense of bribery or misappropriating client's funds, are universally understood and condemned as incompatible with the lawyer's duty to the court. (See O. B., 44-48, notes 30-32.) Rather was this speech a criticism of law enforcement methods and the conduct of the trial of a criminal case, which, in express terms, laid no reflection against the trial judge's integrity. Whether this speech was offensive in the manner charged against petitioner turned upon her statements themselves, their meaning in the context of the trial and their impact upon that trial. Such an evaluation would also take into account petitioner's relationship to the court wherein the trial was pending and the policy of that court toward public discussion of cases there pending. Manifestly, all these were matters for the court affected to consider and evaluate in the first instance. If the Territorial Court is to be able to lay down a universal standard of conduct (R. B., 43) in this area, it may well bring about the same anomaly that was indicated above in connection with the juror interview.

2. Respondent completely misreads the *Isserman* case. (R. B., 42-43.) There, as here, the quality of the attorney's conduct turned on his relation to the federal case and the federal court. New Jersey withheld action until the federal courts had evaluated that conduct. (See *Sacher v. United States,* 2 Cir., 182 F. 2d 416, aff'd 343 U. S. 1.) Only then did New Jersey act and in doing so it based its discipline solely on the contempt judgment of the

federal court.[9] While New Jersey applied its "standards of practice," it did so only as respects an offense against the federal court. It let the federal court first determine whether an offense had been committed against it. In the case at bar, Hawaii should have deferred to the federal court on the question of whether petitioner had offended that court. If the offense had been found, Hawaii could then, as New Jersey did with *Isserman*, determine the effect thereof on petitioner's right to practice in its courts.

3. Plainly *Selling v. Radford* and *Theard v. United States, supra*, do not apply here. (See R. B., 45-47.) At bar, review is sought of action claimed to deprive petitioner of constitutional protection. As already observed, no local autonomy in our system operates outside the restraints of the Constitution. *Selling* and *Theard* deal with the conclusiveness, in a federal disbarment proceeding based on a state disbarment, of the state judgment of disbarment. That question is not presented here.

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[9]The opinion of the New Jersey court makes this abundantly plain:

> "There is no occasion to look behind respondent's conviction. His guilt of contempt has already been found and determined by a court of competent jurisdiction and his conviction affirmed on appeal by two courts. We must necessarily accept his conviction as a fact and for purposes of imposing discipline consider only the result of the criminal or quasi-criminal proceeding. . . ." *In re Isserman*, 9 N. J. 269, 277.

On rehearing the New Jersey court stated that the disbarment it imposed was for appellant's "conviction and sentence for contempt," and that it limited its "inquiry and consideration to the question of whether that conviction merits discipline." *In re Isserman*, 9 N. J. 319, 320, 321.

POINT THREE.

Respondent's Effort to Show That the Finding That Petitioner Impugned the Integrity of Judge Wiig Is Rationally Justified Rests Upon a Misconception of the Issues and a Distortion of the Evidence.

1. The issue here is whether petitioner's Honokaa speech was an "attack upon the administration of justice" and "impugned the integrity of Judge Wiig." On this the evidence must not merely rationally support such conclusions, it must be clear and convincing. (See O. B., 42, 43.) Evidence that petitioner spoke about the *Fujimoto* trial and was critical of its conduct—even that she criticized actions of the judge himself—does not of itself rationally support the conclusion that she called into question the judge's integrity.

Respondent's argument in large part is an effort to prove that petitioner reflected on Judge Wiig's probity by showing that she spoke about the conduct of the trial in *Fujimoto*. (See R. B., 3-13, 51-54.) In her opening brief (O. B., 34) and here again petitioner's position is that the Honokaa speech did refer to and was largely of and concerning the *Fujimoto* trial. But the problem is not whether petitioner spoke about the trial or the conduct of the trial judge. Rather is it what she said about the latter and whether that amounts to a charge of lack of integrity. Respondent's handling of the evidence of what petitioner said and its efforts to make of that the offense found constitute a distortion of the record.

2. Respondent's efforts to prove that peitioner's remarks impugned the integrity of Judge Wiig rest largely upon the following quotation from the Matsuoka notes:

> "There is no such thing as a fair trial in a Smith Act case. All rules of evidence have to be scrapped or the government can't make a case. . . .
>
> "There's no fair trial in the case. They just make up the rules as they go along." [See R. B., 56; R., 577.]

What respondent presents as a single excerpt actually consists of two excerpts separated by over a page of Matsuoka's notes. [See R., 577.] Respondent omits reference to the context preceding and following the first of these excerpts. That which precedes explains the reference to the lack of fair trial as the result of government propaganda and F.B.I. tactics in pressuring witnesses. [R. 576, 577; O. B., 36, 37.] The context following the first excerpt explains the scrapping of the rules as the use of the hearsay exception admitting the declarations of co-conspirators who never knew or saw the defendants—as contrasted with the exclusion of such declarations in trials for the substantive offense such as *Majors-Palaluko*. [R., 577; O. B., 37, 38.] Respondent also ignores that this context expresses a theme struck early in her talk: "Conspiracy means agreement. Government never has used conspiracy when it has a case. When it hasn't got enough evidence, it lumps a number together and says they agreed to do something." [R., 574.] Viewed in all this context the portion of the first excerpt dealing with scrapping the rules would rationally appear to mean that the government

was taking advantage of the hearsay exception in conspiracy cases to prove a case it could not otherwise establish.

The second excerpt in the quote devised by respondent also has a context which comes before and after it. We have discussed this context and the meaning it imparts to the quoted words. (O. B., 38, 39.) Respondent ignores the context and fails to meet our argument.

Having torn these excerpts out of context and tacked them together, respondent then inserts words, found nowhere in the evidence. Thus respondent renders the language, "There could be no fair trial in the Smith Act case *because* all the rules of evidence have to be scrapped *so* the Government could make its case and the rules of evidence and procedure were made up as the case proceeded." (R. B., 57, 58.) Nowhere in the record is there any testimony to the effect that petitioner said the trial was unfair "because" the rules of evidence had to be scrapped, etc. Nor is there any testimony that the rules are being scrapped "so" (*i.e.*, "in order that") the Government could make "its" case. All this is respondent's invention. It seeks to attribute to petitioner language which ascribes partiality and favoritism to Judge Wiig. The language taken from the Matsuoka's notes contains no such words. So far as the evidence is concerned, no such words were used by petitioner. Respondent's argument is a process of interpretation by interpolation to reach a predetermined end. It rests not merely on dubious evidence but on no evidence.

Finally, respondent contends that the excerpts in question must refer to Judge Wiig because only he ruled on the evidence and made up the rules.[10] (R. B., 61, 62.) But this contention derives force only from respondent's interpolations into the evidence. *In context* it is at least equally reasonable to conclude that, anent the scrapping of the rules, petitioner's remark was that in any Smith Act case the Government can make a case only by taking full advantage of the broadest admissibility for hearsay afforded by a conspiracy trial, and that, concerning making up the rules, she said the Government continually presses for broadening the rules from one case to the next. Absent language ascribing to Judge Wiig a purpose to aid the Government in *Fujimoto*—and no such language is found in the evidence here—the nature of this case (see O. B., 43, 44) requires taking the reasonable, exculpating interpretation. This would seem imperative in view of the testimony of the witnesses on this part of the speech, four of whom recall petitioner's remark as attributing the conduct in question to the "government" and two of whom recall it as "they." (O. B., 39.) None gave the remark so as to attribute the conduct to Judge Wiig.

3. Similar gloss by interpolation and reading excerpts out of context characterizes respondent's treatment of the

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[10]Here again respondent misquotes the evidence. It attributes to petitioner the words "the rules of evidence and procedure were made up as the case proceeded." (R. B., 58, 62.) According to Matsuoka's notes, it was "they just make up the rules as they go along." [R., 577.] The latter (in context as already developed) is a generalized statement about Government tactics. Respondent's interpretation-by-interpolation is calculated to make the remark apply only to the judge in *Fujimoto*. The Territorial Court found the remark to have been made as respondent sets it out. [R., 117.] The court below made no finding as to this remark. [R., 561.]

remark about "a new crime." The remark shown in the evidence is not as quoted by respondent. (R. B., 62.) As shown by the Matsuoka notes, it was, "unless we stop the Smith trial in its tracks here, there will be a new crime. People will be charged with knowing what is included in books, ideas." [R., 577.]

Respondent claims that this is a charge that the judge was "encouraging new crime . . . unless [his conduct is] stopped in its tracks." (R. B., 63.) Nothing could be more unreasonable. Obviously the remark as shown in the evidence is that Smith Act prosecutions, based as was the *Fujimoto* case on books,[11] will result in making a crime —viz., violation of the Smith Act—out of reading and thinking. The language which follows this excerpt—dealing with reading as it was treated in the Los Angeles Smith Act trial[12] and the dangers to reading, intellectual freedom and free speech—makes this construction inescapable.

4. Respondent's position throughout this point comes down to these propositions: Because petitioner spoke about the *Fujimoto* trial, she spoke about Judge Wiig; because she spoke critically about the conduct of the trial, she attacked Judge Wiig; because she "attacked" Judge Wiig, she impugned his integrity. The reasoning is fallacious at each step. Petitioner did indeed speak about the *Fujimoto*

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[11]This is a theme sounded often in the speech. See, ". . . men in power are trying to put men in jail because of their thoughts and books written before he was born." [R., 574.] "One of the reasons Jack Hall is on trial is because it is said he once got a book. . . ." [R., 574.] "Witnesses testify what government tells them to just as they read portions of books like overthrow the government and leave out the rest. . . ." [R., 576.] The duffel-bag of books incident. [R., 576.]

[12]*Yates v. United States,* 354 U. S. 298.

trial; that in doing so she did not necessarily speak of Judge Wiig appears from the most casual reading of Matsuoka's notes. Petitioner spoke critically of the conduct of the trial and Matsuoka's notes show that this was not criticism of Judge Wiig's conduct except to the extent that she said that Judge Wiig gave the Government the evidential latitude which the conspiracy rules permit. Reason surely forbids respondent's central proposition that to criticize a trial judge is to "attack" him and impugn his integrity. Respondent's position would require that any attorney's comment (other than praise) on a judge's conduct of a trial be made at the peril of discipline. When that day comes, the temple of justice will lose a most salutary corrective.

5. Respondent's contention that the findings of the two lower courts are here entitled to "presumptions in favor of correctness" are plainly misdirected. (R. B., 65.) Petitioner does not ask this court to resolve issues of fact or determine questions of credibility. Petitioner's case here rests on the prosecutor's evidence against her. She claims that this evidence is too insubstantial to support the key inferences of impugning integrity and attacking the administration of justice. Given the constitutional protections asserted and the standard of proof here operative, the solidity of the evidence and the reasonableness of the findings are open to independent examination by this court. *Schware v. Board of Bar Examiners,* 353 U. S. 232; *Konigsberg v. State Bar,* 353 U. S. 252. For other cases see, O. B., 42, 43.

POINT FOUR.

Respondent Has Presented No Basis for Denying First Amendment Protection to Petitioner's Speech.

1. Stripped to its essentials, respondent's argument is that petitioner's speech offended Canon One and is therefore not entitled to First Amendment protection. If there were no question that petitioner had impugned Judge Wiig's integrity, this position might be supportable. The primary question is did the speech so offend? On this point respondent ignores the quality of proof which the First Amendment demands. The imperatives of free public discussion require a clearness, an unambiguity, a convincing quality which this record here does not provide. The speech on its face did not in terms attack the Judge's integrity. The evidence contains no showing of words or circumstances that make out a clear or imminent risk that Judge Wiig's integrity would stand impugned before the public. Nor does it show a peril, clear or present, that public confidence in the court would otherwise be impaired. Indeed it is only with the most strained construction that any danger to legitimate concerns of judicial administration can be raised from this evidence. Surely upon a balancing of all factors (see O. B., 59-61) it cannot be said that the showing here is enough to justify abridgement of speech.

2. It is of a piece with respondent's faulty premises that it claims that to apply the clear and present danger test would "nullify" Canon One. (R. B., 80.) The issue here is not a choice between freedom of expression on the one hand and Canon One on the other. The latter defines the interest of the state against which free speech is to

be weighed. Respondent's failure to attempt to strike a balance between them betrays the defect in its position. For in that process respondent would be required to weigh the *actual* words used and the actual circumstances of their use and to assay the likelihood of immediate and serious harm to the public confidence in the courts. Respondent has chosen to rely on its own *ipse dixit,* which in turn rests upon its distortion of the evidence above reviewed, that petitioner "attacked" the integrity of Judge Wiig. By First Amendment standards, respondent has offered no ground for curtailing petitioner's speech.

3. Respondent presents no authority to show that the lawyer of record, while the case is pending, is under restraint not to engage in public comment. We take it then that the position advanced in petitioner's opening brief (pp. 55, 56), that the only limitations imposed upon the lawyer of record during the pendency of the case are those applicable to lawyers generally, is not controverted. Apparently there is no authority in American law for the holding of the court below [R., 565, 566] to the effect that during the trial the lawyer of record is under "restraints" not otherwise applicable.

POINT FIVE.

Respondent Offers No Support for the Judgment Affirming the Holding That the Juror Interview Was Gross Misconduct.

1. Respondent's brief leaves great uncertainty as to what it conceives the misconduct to have been. It is not clear whether respondent claims that petitioner "grossly misconducted herself" in that she searchingly interrogated the juror about matters occurring in the jury room, or in-

terrogated him when he was ill, or interrogated him when others were present,[13] or filed an untruthful affidavit. (See R. B., 85-88.) The original charge, as amplified by a bill of particulars, was that petitioner had transgressed the standards laid down in Opinion 109 and *Rakes v. United States* (D. C. C. A.), 169 F. 2d 739. [R., 13.] These two citations deal only with post verdict interviews as such. It is therefore inescapable that petitioner was tried only on the charge of having conducted such an interview. All else is respondent's belated embroidery. It has nothing to do with the charge on which petitioner was tried or the findings which underlie the conclusion of gross misconduct. The Territorial Court's finding was of misconduct consisting of repeated visits and studied interrogation. [R., 119-121.] And this was affirmed below. [R., 568.] We therefore take it that the issue here is only whether it is misconduct in the federal court for federal attorneys to interview jurors in federal cases, post verdict, concerning matters occurring in the jury room when these matters pertain to possible mental imbalance or frameup or other wrongdoing affecting the jurors. Respondent's introduction of other issues at this late date cannot serve to mask the question presented for decision.

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[13]Respondent's description of "petitioner, with her client, Jack Hall, Joseph Kealalio, President of the ILWU, and Grace Oshiro, an ILWU steward, together with Ellen Cabreros, an ILWU member, in toto, harassing an admitted 'gravely ill' man" (R. B., 85) is utter distortion. Petitioner first saw the juror at the request of his sister (Ellen Cabreros) and in the presence of his family and the sister and her "girl friend" (Grace Oshiro). [R., 212, 316.] On the other two occasions, in addition to Hall and petitioner on the second occasion and Hall, petitioner and Kealalio on the third, the juror's wife and daughter were present. [R., 386, 485, 215, 217, 390.] It is wholly misleading to give the impression that the juror interview was conducted with the juror surrounded by a large group of unfriendly people.

2. On the point at issue respondent claims that "later pronouncements of this Court" vitiate petitioner's position (R. B., 92.) Respondent cites no such cases. The rule of the *Hyde* and *MacDonald* and the other authorities cited by petitioner (O. B., 66) are plainly necessary to the sound administration of justice and clearly applicable to the circumstances of this case. This is not a question of impeaching a verdict by narration of the juror's thought processes or of insulating the jury room from outside influences. Rather it is one of the right and duty of counsel and court to investigate substantial possibilities of a tainted verdict.

Conclusion.

For all the reasons indicated in petitioner's opening brief and this brief, the judgment of the lower courts should be reversed and vacated.

Respectfully submitted,

JOHN T. MCTERNAN,
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MYER C. SYMONDS,
Of Counsel.

APPENDIX A.

In the Supreme Court of the Territory of Hawaii.

In the Matter of Harriet Bouslog Sawyer, also known as Harriet Bouslog, an Attorney at Law.

Motion to Dismiss.

Addressed to Supreme Court of Territory of Hawaii.

Respondent, by way of return to the order to show cause issued herein on July 8, 1955, moves to dismiss the order to show cause upon the following grounds:

1. This court is without jurisdiction to discipline respondent regarding the matters set forth in the report of the Legal Ethics Committee in that:

a. The alleged facts in the "Report of the Legal Ethics Committee" are insufficient to give this court jurisdiction over respondent.

b. The alleged matters complained of arose out of legal proceedings in the Federal Court and not in connection with any legal proceeding pending in any court over which this court has jurisdiction.

2. The proper forum for disciplinary proceedings, if any was warranted, was the United States District Court for the District of Hawaii as the alleged improper conduct occurred in connection with a case pending in that Court.

3. This proceeding is not authorized by the rules of this court in that at the time the alleged conduct is said to have occurred in December 1952 and July 1953, neither the Bar Association of Hawaii nor its executive committee was authorized or empowered to institute complaints against attorneys.

4. It is unjust and a violation of due process of law to give *ex post facto* operation to the April 21, 1954 amendment to Rule 19 of this Court by requiring respondent to answer a complaint brought by the Executive Committee of the Bar Association of Hawaii involving alleged conduct occurring in December 1952 and July 1953 before said amendment authorized and empowered the Bar Association to initiate disciplinary proceedings.

5. These proceedings deny to respondent equal protection of the laws guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States in that:

a. Comments of others directly and indirectly tending to bring about the unfair administration of justice to the prejudice of defendants represented by respondent in the same court action out of which the alleged comments arose did not result in charges or contempt proceedings. See following comments and statements made and published during progress of the case of *United States v. Fujimoto et al.*, copies of which are attached: (1) press release of the Attorney General of the United States, August 28, 1951 (Ex. A); (2) Honolulu Star-Bulletin editorial, Tuesday, January 20, 1953, "Never Trust a Communist" (Ex. B); (3) Honolulu Star-Bulletin editorial, January 22, 1953, "The Long Arm Closes—Once More" (Ex. C); (4) "Stalin's Plot Against America," series of eight articles by Fletcher Knebel in Honolulu Star-Bulletin, March 25, 1953 through April 2, 1953 (Ex. D).

b. Affidavits and motions have been filed in litigation in territorial courts, over which this court has plenary power, charging false and scandalous statements and an attempt to flout the authority of the court and usurp its functions by attorneys under oath or in court pleadings without any proceedings being taken against the attor-

neys so charged or against the attorney making the charge. See *In Re Trust Estate of Wallace R. Farrington,* Civil No. 139 in the Circuit Court of the First Judicial Circuit, Motion of William F. Quinn filed January 5, 1955 and affidavit of E. C. Moore, Jr. filed January 11, 1955, excerpts from which motion and affidavits are attached hereto (Ex. E).

c. No other attorney admitted to practice by this court since the creation of this court by the Hawaiian Organic Act has, so far as respondent has been able to determine, been proceeded against by this court for comment about or conduct in proceedings in the United States District Court of the District of Hawaii.

d. No other attorney admitted to practice by this court since the creation of this court by the Hawaiian Organic Act has, so far as respondent has been able to determine, ever been proceeded against for out of court comment on judicial proceedings where such comment did not obstruct or tend to obstruct justice or constitute contempt per se.

e. It has been the practice in the courts of this jurisdiction from time immemorial to permit the filing of affidavits of jurors after their verdict in connection with motions for new trials and to permit the filing of affidavits of attorneys respecting conversations with jurors after verdict, and to permit jurors after verdict to discuss their deliberations—if they chose—with attorneys, the press or members of the public, and to permit attorneys to discuss with jurors after their verdict matters occurring during the trial and during their deliberations to determine whether the verdict was lawfully and properly arrived at, and no other attorney in this jurisdiction, so far as respondent has been able to determine, has ever been proceeded against for interviewing a juror after verdict and filing with the court an affidavit of the substance of that interview.

6. It appears from the face of the record that the alleged grounds for discipline are barred by laches.

7. The "Report of the Legal Ethics Committee" attached to the order to show cause does not set forth facts sufficient to constitute grounds for discipline.

8. It appears from Paragraph II of the Complaint under Rule 19 dealing with the Honokaa speech, and from the report, that the alleged words of respondent are protected by the right of free speech guaranteed by the First Amendment, and that the utterance of these alleged words under the circumstances shown did not constitute an obstruction of justice, which created a clear and present danger necessary to remove the constitutional protection from said speech.

9. It does not appear from Paragraph II of the Complaint under Rule 19 dealing with the Honokaa Speech, nor from the report, in what respects respondent was guilty of violation of Canons 1 and 22 as charged in that:

a. The report fails to set forth any facts showing that the alleged words of respondent were not protected by the First Amendment to the Constitution of the United States.

b. The report fails to show that respondent intended to interfere with the administration of justice or any reasonable probability that the alleged statements would have such an effect.

c. The report fails to set forth any facts that the alleged words of respondent constituted unjust criticism prohibited by Canon 1."

d. The report fails to set forth facts showing that the alleged words of respondent indicated a disrespectful attitude towards the courts prohibited by Canon 1.

e. The report fails to set forth whether the alleged words of respondent were true or untrue.

f. The report fails to show by what means or in what manner the alleged words of respondent were not characterized by candor and fairness as required by Canon 22.

10. It does not appear from the report by what means or in what manner the alleged words of respondent imputed to the Judge unfairness in the conduct of the Honolulu trial.

11. It does not appear from the report by what means or in what manner the alleged words of respondent impugned the integrity of the local federal court.

12. It cannot be ascertained from the report what other comments were made by respondent at Honokaa that imputed to the Judge unfairness in the conduct of the trial and impugned the integrity of the local federal court.

13. The alleged words of respondent as set forth in the report differ from the words attributed to respondent in quotes by complainant's witness, Yoshio Matsuoka, in the Hilo Tribune Herald for December 15, 1952, a copy of which is in evidence, in the following material respects: whereas the report, without quotes, alleges respondent said "horrible and shocking things were going on at the trial; that there was no fair trial in the case; that they just made up the rules as they went along; that unless the Smith Act trial was stopped in its tracks in Honolulu there would be a new crime," Witness Matsuoka quoted respondent as follows:

> Mrs. Bouslog, speaking for a half hour, spoke of "some rather shocking and horrible things that go on at the trial."
>
> There is "no such thing as a fair trial in a Smith Act case," she charged. "All rules of evidence have to be scrapped or the government can't make a case.

> They just make up the rules as they go along," she told her listeners.
>
> "Unless we stop the Smith Act trial in its tracks here," there will be a "new crime—that of knowing what's in books," and will lead to the "Dark Ages of thought control," she asserted.

Even assuming the accuracy of the quotations of complainant's witness as above set forth, the statements attributed to respondent constituted fair comment, are protected by the First Amendment, and are not a violation of any Canon of Ethics.

14. Assuming the accuracy of the quotations, they say in substance no more than what was already in the record of the trial and theretofore made public.

15. It does not appear from Paragraph III of the Complaint under Rule 19 dealing with the Fuller affidavit or from the report:

a. In what respects the affidavit of respondent did not fully disclose to the court the condition of Mr. Fuller.

b. In what respect the failure to report to the court that an attempt had been made to get an affidavit from Mrs. Fuller, who refused to sign one, constitutes basis for discipline.

c. In what respect the Committee considers the affidavit filed insufficient to apprise the court that no affidavit was obtained from Mr. Fuller because of his condition.

16. It does not appear from Paragraph III of the Complaint under Rule 19 dealing with the Fuller affidavit, or from the report, that respondent intended to interfere with the administration of justice or any reasonable probability that the filing of the affidavit would have such an effect.

17. The report is ambiguous, unintelligible and uncertain in that it cannot be ascertained therefrom, nor does it appear therein, whether with reference to the Fuller affidavit the Committee is recommending discipline because respondent interviewed the Juror Fuller in addition to the charges in Paragraph III of the Complaint.

18. The Committee is recommending discipline based upon a charge not contained in the Complaint in that Paragraph III of the Complaint dealing with the Fuller affidavit charges respondent with unprofessional conduct in interviewing a juror known by her to be indisposed, whereas the report of the Committee recommends discipline because of the additional ground of failure to disclose to the court that respondent had attempted to get an affidavit from Mrs. Fuller who refused to sign one and could not get an affidavit from Mr. Fuller because of his condition.

Wherefore, respondent prays that the order to show cause be dismissed.

Dated: Honolulu, T. H., this 19th day of October 1955.

HARRIET BOUSLOG, Respondent
By Myer C. Symonds
Myer C. Symonds
Her Attorney

(Documents marked Exhibits A through E attached to the above motion and supporting Memorandum of Points and Authorities omitted.)

APPENDIX B.

3044

In the Supreme Court of the Territory of Hawaii.

In the Matter of Harriet Bouslog Sawyer, also known as Harriet Bouslog, an Attorney at Law.

Motion to Supreme Court of Territory of Hawaii to Reconsider Its Order Denying Motion to Dismiss.

Now comes respondent and moves this Court to reconsider its order entered herein on November 3, 1955, denying the motion to dismiss. As grounds therefor respondent alleges that the order of the Court is contrary to law in that:

a. No adjudication was made by the United States District Court for the District of Hawaii with respect to whether the conduct of respondent regarding the Honokaa speech or the Fuller affidavit constituted grounds for discipline.

b. Civil Rule 1(d) of the Federal Court for the District of Hawaii specifically provides for discipline of an attorney by that court "for good cause shown and after an opportunity has been given to be heard."

c. The alleged misconduct of respondent having occurred in the Federal Court it is an interference with and usurpation of the power thereof for this Court to entertain disciplinary proceedings regarding conduct involving that court.

d. The entertaining of jurisdiction of the issues involved by this Court constitutes an interference with the administration of justice in the Federal Court.

e. In *Ackerman v. ILWU et al.*, 187 F. 2d 860 (cert. den. 342 U. S. 859, 96 L. ed 646), the Bar Association of

Hawaii, the complainant herein, filed Brief of Amicus Curiae in the United States Court of Appeals for the Ninth Circuit, seeking to reverse judgment of a three-judge court sitting in the Federal Court in Hawaii, enjoining further proceedings in the territorial courts, upon the ground that the judgment constituted an interference by the Federal Court with the independence of the territorial court. On page 3 of its brief, signed by officers of the Bar Association, including W. B. Stephenson, the present president of the Bar Association, and Edward N. Sylva, present Attorney General for the Territory and one of the prosecutors in this proceeding, it is stated:

> Since these determinations seriously affect the jurisdiction of the courts of the Territory of Hawaii as components in an independent judicial system, The Bar Association of Hawaii desires to direct its brief to the question of the relative jurisdictions of the territorial and federal courts, the relationship between them and the dependence upon, or independence of, one judicial system to the other.

f. The foregoing position of the Bar Association demonstrates the inconsistency of its position herein. The Bar Association contends herein that without any determination by the Federal Court that the conduct of respondent constituted a basis for discipline after hearing in accordance with the rules of the local Federal Court, this Court has jurisdiction to hear the testimony and determine whether alleged conduct in the Federal Court, which is according to the Bar Association "an independent judicial system," should be disciplined.

g. The determination of this Court, by a divided court, that it has jurisdiction to proceed further regarding the Fuller affidavit, constitutes an interference with the juris-

diction of the Circuit Court for the Ninth Circuit which has jurisdiction over all issues involving the Fuller affidavit by reason of the appeal now pending in that court. Point VII of the appellants' Brief in the Fujimoto appeal contains the following assignment of error:

> The trial court erred in denying appellants' supplemental motion for a new trial without a hearing on the ground that acts and declarations of Juror Fuller were inadmissible as a matter of law.

Appellants' reply brief in the appeal, pp. 166-167, demonstrates that there is squarely before the Court of Appeals all questions sought to be raised by the Bar Association complaint.

> Appellants sought a chance to offer evidence to prove these matters, setting forth in their moving papers in affidavit form a *prima facie* showing which intitled them to a hearing. The appellee opposed the hearing. The court foreclosed it. If the verdict was properly arrived at, if in fact it was not based on coercion, intimidation, fear, passion and prejudice, those facts would have appeared of record had the court permitted appellants to proceed with their offered proof on the day the motion came on for hearing.
>
> . . .
>
> If the facts stated in Attorney Harriet Bouslog's affidavit were in any way misleading, unfairly stated, false, or made by Juror Fuller when he was irrational, or if the facts did not coincide with reality, as the Government intimates, a prompt hearing accorded appellants, or an investigation made by the court, would have determined the facts . . .

h. The relief sought in the appeal is to have the local Federal Court hold a hearing to determine the facts and

issues raised by the motion for new trial supported by the Fuller affidavit.

i. For this Court to pass upon whether the Juror Fuller was "gravely ill," as found by the Bar Committee, when interviewed by respondent would constitute an usurpation of the function of the Federal Court in the event of a reversal on appeal for failure to conduct a hearing on the Fuller affidavit.

j. The Fuller affidavit was filed with the local Federal Court and the court passed upon the pertinency of the affidavit. Therefore this Court is being asked to pass upon the ethics involved in connection with a matter squarely presented to the Federal Court, a matter on which the Federal Court failed to act although it had power of contempt, discipline or grand jury action if any of the foregoing were warranted. To take jurisdiction of the Fuller affidavit squarely violates the position of the Bar Association in its amicus brief in the *Ackerman* case, *supra.*

k. The determination by this Court of lack of jurisdiction to proceed regarding the Fuller affidavit would probably result in the determination of any other issue that may properly be before the court by way of stipulation of the parties or pre-trial conference and without any extended hearing.

Wherefore, it is respectfully submitted that this motion for reconsideration should be granted.

Dated: Honolulu, T. H., this 7 day of November 1955.

HARRIET BOUSLOG, Respondent
By Myer C. Symonds
Myer C. Symonds
Her Attorney

Notice of Motion

To: Edward N. Sylva, Attorney General, Territory of Hawaii, A. William Barlow, Attorney for the Bar Association of Hawaii, and Morio Omori, Deputy Attorney General, Territory of Hawaii:

You, and each of you, will please take notice that the foregoing Motion will be presented before the Supreme Court of the Territory of Hawaii, in its courtroom in the Judiciary Building, Honolulu, T. H., on Monday, November 7, 1955, at 9 o'clock A. M., or as soon thereafter as counsel may be heard.

Dated: Honolulu, T. H., this 7 day of November 1955.

Myer C. Symonds
Myer C. Symonds
Attorney for Respondent

APPENDIX C.

No. 3044

In the Supreme Court of the Territory of Hawaii.

In the Matter of Harriet Bouslog Sawyer, also known as Harriet Bouslog, an Attorney at Law.

Order of Supreme Court of Territory of Hawaii Denying Motion to Dismiss.

The Motion to Dismiss the Order to Show Cause in the above entitled cause having come on for hearing before this Court on the 3rd day of November, 1955, counsel for the parties herein having submitted memoranda and presented argument, and good cause appearing,

It Is Hereby Ordered that said Motion to Dismiss the Order to Show Cause be and is hereby denied, Chief Justice Edward A. Towse dissenting in part upon the ground that the charges premised upon the Fuller affidavit should be dismissed as an interference with the administration of justice in the United States District Court for the District of Hawaii and a possible usurpation of the power thereof.

Dated: Honolulu, Hawaii, November 29, 1955.

EDWARD A. TOWSE
Chief Justice, Supreme Court
of the Territory of Hawaii

[Seal]

Approved as to form:

MYER C. SYMONDS
Attorney for Respondent

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii.

Dated, at Honolulu, T. H., Nov. 29, A. D. 1955

GUS N. SPROAT,
Clerk, Supreme Court, Territory of Hawaii